Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

85-2126

In The

SUPREME COURT of the UNITED STATES

October Term, 1986

No.

HENRY MALACHOWSKI and/or
JULIA MALACHOWSKI

Petitioner

-against-

CITY OF KEENE
MARK J. BENNETT, Esq.

CITY OF KEENE POLICE DEPARTMENT
PATROLMAN RANDALL LaCOSTE
SERGEANT H. BROWN

JUDGE BERNARD J. HAMPSEY, Jr.
JUDGE RICHARD J. TALBOT

DAVID S. PARK, Esq.

YOUTH SERVICES INC., of the
MONADNOCK REGION, a corporation
and RICHARD ARCHIBALD

Respondants

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Were the parents and their minor daughter's Fourth Amendment rights violated by a Keene patrolman who forced entry into parents' home, seized parents' daughter, Amy, without a warrant, without permission to enter, without probable cause where there was no offense committed, make an unreasonable arrest of the minor, tell her she is his prisoner and is going to YDC (Youth Development Center), take her out of parents' home, never reading her her Miranda rights, detain her overnight at the police station without written authorization from a judge, deny her the right to her own counsel and/or parents present, interrogate her and never inform the parents and/or the minor of the charge for her arrest?

2. Was Equal Protection and Due Process of the law under the Fourteenth

Amendment and N.H. Statutes violated when the Keene District Court failed to give the parents and the minor written notice of a petition of the specific charges or factual allegations, given to the child and her parents sufficiently in advance of the hearing to permit preparation?

3. Can the Keene District Court ignore the U.S. Supreme Court essentials of due process of the law by failure to give written notification given to the child and her parents of the minor's right to be represented by counsel retained by the parents, being that the minor is not indigent and where there is no written waiver for the court to appoint counsel for Amy?

4. Can the Keene District Court sustain a charge of delinquency of disorderly conduct when the court failed to order the recipients, who are named, by name, in the petition charge of August 4, 1984, and as

necessary parties to the offense, to appear at the hearing for confrontation and cross-examination guaranteed to Amy under due process of the law and by the N.H. Constitution?

5. Was it violative of due process of the law when the arresting officer was not present at the initial or adjudicatory hearing at the Keene District Court?

6. Was perjury committed by Sgt. Brown who was not a witness, signed the petition, under oath, which is contrary to the police report, stating that Amy committed a disorderly conduct offense on public property, falsely naming the parents as recipients that Amy was shouting obsenities at and having physical contact with Henry and Julia Malachowski, an offense which never occurred?

7. Was the Eight Amendment violated when the minor was deprived of her liberty

for thirty-nine (39) days when a plea of "Not True" was made at the initial hearing where no sworn testimony was given against Amy by the recipients?

8. Was the Sixth Amendment violated when the minor was deprived of the right to be released to her parents, older married sister, relative or friend to obtain witnesses for her defense, as a due process right to a fair trial?

9. Was the Fifth Amendment violated when the minor was deprived of written notice of the charge against her, where there is a plea of "chargeable" when neither the minor or her attorney (not retained by the parents) made such a plea at any hearing, and where the judge affirmed Amy was not a delinquent? Could the Keene District Court sustain personal jurisdiction over Amy?

10. Was the parents' entitlement under

the Equal Protection clause to a Due Process hearing under the Fourteenth Amendment violated when the parents were deprived of their custody rights over Amy without being given written notice of a petition of the issues they are to meet and without a hearing, and, by private, prior agreement, to have custody of their minor daughter given to Youth Services, Inc., a private corporation, by the Keene District Court judge?

11. Can Amy and her parents be denied equal protection and due process of the law by the city attorney suppressing exculpatory evidence favorable to Amy's defense for acquital by taking the police record of Amy out of the juvenile police files to give to his attorney so that it will not be used against him in parents' federal action in which he is named as defendant?

12. Can the parents be deprived of equal protection and due process of the law under the Fourteenth Amendment where the city attorney, clerk of the Keene District Court and the judge deprive the parents of their right to see the juvenile file on Amy and the charge for her arrest?

13. Is the First Amendment offended by Amy swearing in the confines of her own home, where no complaints were filed, isn't this considered free speech?

14. Can the minor be denied the right to appeal when she does not know what an appeal means and was never told by her attorney?

15. Can the judge of the Keene District Court ignore the U.S. Supreme Court requirements of due process of the law in juvenile delinquency proceedings where the minor was deprived of her liberty?

16. Was the Due Process Clause of the

Fourteenth Amendment violated when the Keene District Court failed to give written notice to the parents to appear in court, have authority to adjudicate parents' custody rights of Amy and all other rights secured to them by the Federal Constitution without having personal jurisdiction over the parents?

17. Was due process of the law violated when the recipients named, by name, in the petition charge as necessary parties to the offense, unlawfully signed by Sgt. Brown, were not summoned to court to testify at the time prosecution must establish probable cause to believe the minor committed the offense of disorderly conduct, where the arresting officer was not present to offer testimony and where prosecution and the judge were fully aware that Sgt. Brown cannot sign the petition being that he is not the recipients, and that

the petition charge conflicts with the police report?

18. Can the federal court (Martin F. Loughlin, U.S.D.J.) fail to do his duty to guard and enforce all rights secured to the petitioners by the Constitution of the United States, and ignore parents' Civil Rights action of the same essential issues already determined by other federal and appeals courts and refuse to make a decision upon parents' constitutional claims where parents' parental rights of custody of their minor daughter Amy, which is protected by the due process clause of the Fourteenth Amendment, was terminated in state court juvenile proceedings in violation of Due Process and Equal Protection of the laws?

19. Can the federal court in its order entered, state...

"The placement to YSI by the adjudi-

> catory hearing of September 11, 1984 was clearly illegal relative parents' due process rights...Exhaustion of State remedies is not an issue here ...The court finds that it does have jurisdiction for the federal constitutional violations pursuant to 28 U.S.C. § 1331 as a 42 U.S.C. § 1983 action...Younger v Harris type abstention only applies to the prosecutorial stage of a juvenile court proceeding...There is no adequate remedy at law for the parents because they have no appellate rights...The Keene District Court shall order that Amy be returned to the custody of her parents..."

then vacate its order after private agreement with the attorney for the state court judges, cited irrelevant authorities that the court does not have jurisdiction of the subject matter, dismissed and remanded parents' Civil Rights action alleging constitutional claims to state court where parents have no action pending? Does this not violate due process of the law where the judge breaches impartiality, makes an agreement with opposing counsel without permitting notice to the petitioners to

rebut or confront before a decision is made?

20. Upon petitioners' appeal to the First Circuit Court of Appeals from the judgment entered by the lower court, can this Court of Appeals abuse its appellate jurisdictional authority by acting as attorney, add to the already perjured petition charges unlawfully signed by Sgt. H. Brown, act as a trial court in making decisions that were not controverted in the lower trial court, where there was no evidentiary hearings, deprive the petitioners of oral hearing at the Appeals Court, then make its decision in every sentence and paragraph contrary and repugnant to the U.S. Supreme Court, other Appeals and federal courts decisions of the same essential issues cited in petitioners' brief, already determined by those courts, and then blatantly nullify the Amendments of

the Federal Constitution and ignore the laws of the United States, N.H. Constitution and its laws?

21. Can this Court of Appeals defame the petitioners with libel of abuse and neglect, with total disregard for the truth; aid and abet in defendants' unconstitutional seizure, kidnapping of parents' minor daughter which the lower court held in its order of January 4, 1985 as being clearly illegal relative parents' due process rights, and then affirm the lower court and Keene District Court decisions that are clearly contrary and repugnant to petitioners'rights secured to them by the Constitution of the United States, N.H. Constitution and its laws, obstruct justice for purpose to deprive the petitioners of their right to prosecute their constitutional claims in federal court against the state court judges and all de-

fendants who were willing participants in the unconstitutional seizure of petitioners' minor daughter? Isn't this violative of Equal Protection and Due Process of the law under the Fourteenth Amendment of the Federal Constitution?

22. Where petitioners have no pending action in state court, and there is no Doctrine of Exhaustion of State remedies, petitioners, as their right, brought their constitutional claims to federal court to vindicate their rights denied them in Keene District Court juvenile delinquency proceedings; can the First Circuit Court of Appeals, contrary to its own decision entered on May 15, 1985, force the petitioners to have Keene District Court decide petitioners' constitutional claims, in the same court, same judge and defendants where petitioners, in juvenile delinquency proceedings of Amy, have been

continuously deprived of their rights secured to them by the Constitution and laws of the United States, N.H. Constitution and its laws, in violation of due process and equal protection of the laws under the Fourteenth Amendment of the Constitution of the United States?

23. Being that Sgt. Brown signed the petition of August 4, 1984 and was not a witness, and where such petition was never served upon the parents as required by law N.H. RSA 169-B:7, where parents are named, by name, as the recipients to the offense, never served upon Amy, wouldn't his testimony to the alleged offense be inadmissible as being hearsay as decided by the United States Supreme Court?

24. Would it be considered double hearsay of a supposed "plea of chargeable" where the arresting patrolman was not present in court and the parents were not made

known that they are named as the recipients to the offense to offer testimony on August 4 and September 11, 1984 to corroborate or rebut the offense in the petition of August 4, 1984 signed by Sgt. Brown?

25. Isn't this considered lack of evidence where the standard of reasonable doubt is precluded on grounds that Sgt. Brown's petition charge is hearsay, is inadmissible, wherein the Keene District Court cannot sustain a charge of disorderly conduct without written notice given to the recipients to appear in court as necessary parties to the offense prerequisite to confer jurisdiction upon the court to act, and without the arresting patrolman present, where Amy was deprived of her right guaranteed under due process of the law, the right to confrontation, cross-examination of witnesses against her; shouldn't the minor have been released?

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LIST OF PARTIES TO THE PROCEEDING

HENRY MALACHOWSKI and/or
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Plaintiff

VS.

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MARK J. BENNETT, ESQ.

CITY OF KEENE POLICE DEPARTMENT
PATROLMAN RANDALL LaCOSTE
SERGEANT H. BROWN

JUDGE BERNARD J. HAMPSEY, Jr.
JUDGE RICHARD J. TALBOT

DAVID S. PARK, ESQ.

YOUTH SERVICES INC. of the
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Respondants

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the

First Circuit dated March 28, 1986 which affirmed the judgment of the district court dated June 12, 1985.

DECISION BELOW

The Court of Appeals for the First Circuit, namely Levin Campbell, Chief Judge, Bownes and Breyer, Circuit Judges, entered its judgment on March 28, 1986 affirming the judgment of the lower federal court, a copy of such judgment is printed as page 54a of the Appendix herein.

Petitioners submitted a Motion for Decision Upon Appellants' Reply Brief --- as being treated as a petition for rehearing -- is denied.

In reaching its decision, this court considered appellants' reply brief and appellants' other submissions.

By the Court:
Francis P. Scigliano
Clerk

JURISDICTION

This petition for certiorari to review the judgment of the United States Court of Appeals for the First Circuit filed March 28, 1986, is timely made within 90 days of the filing in that Court on April 8, 1986 of its Order on Appellants' Motion for Decision Upon Appellants' Reply Brief --- treated as a petition for rehearing -- is denied.

The jurisdiction of this Court to review such judgment is invoked pursuant to 28 U.S.C. Section 1254 (1), Rule 17 (a)(c) of this Court and federal questions; this case comes within the provisions because the decision of the Court of Appeals for the First Circuit in affirming the lower federal court's judgment, is in conflict and repugnant to the U. S. Supreme Court decisions, other federal and Appeals Court decisions and to the Constitution of the

United States.

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

1st Amendment to the Constitution of the United States, provides:

> "Congress shall make no law...or abridging the freedom of speech.."

4th Amendment to the Constitution of the United States, provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause..."

5th Amendment to the Constitution of the United States, provides:

> "No person shall be held to answer ...nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law..."

6th Amendment to the Constitution of the United States, provides:

> "In all criminal...and to have

assistance of counsel for his defense."

7th Amendment to the Constitution of the United States, provides:

"Right of trial by jury."

8th Amendment to the Constitution of the United States, provides:

"...Cruel Punishment Prohibited,.. nor cruel and unusual punishment inflicted."

Section 1 of the 14th Amendment to the Constitution of the United States, provides:

"...nor shall any State deprive any person of life, liberty, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. Section 1331 Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. Section 1343 (3)
Civil rights and elective franchise

(a) The district courts shall have

original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States

42 U.S.C. Section 1983
Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

(a) The Facts

Petitioners have been parents to Amy Christine Malachowski (hereinafter Amy) by legal adoption in 1969 at age eleven months and have had an excellent parent-child relationship evinced by school records, other family members and friends.

Malachowskis moved from Connecticut to New Hampshire where Amy, swayed by her peers, put school work last and started going out school nights.

In January, 1984, N.H. Department of Welfare advised petitioners that a CHINS petition would be ineffective, Welfare can do nothing without abuse or neglect, just use parental authority and tell Amy "NO", she can't go out school nights, school work comes first, etc.

Amy was told "NO", took several Dexi-trim capsules, petitioners were alarmed,

Amy was rushed by ambulance to the hospital. Welfare came to the hospital and was told their plan did not work.

That night, January 11, 1984, Amy asked her parents to take her home. Welfare said "NO". Parents asked why, Welfare stated "That house is danger, Welfare has custody".

Later, upon release from the hospital, Amy, with no court hearing, was taken by Welfare to a foster home. The parents were given no written notice of a petition or the state's interest for the taking of custody of Amy.

Petitioners were repeatedly denied access at the Keene District Court to see the charges for Welfare's taking custody of Amy.

In the first week of Amy's placement by Welfare, she had a fall down the stairs, was unconscious, had a serious concussion,

suffered severe headaches, was given no medical care even though petitioners notified Welfare. were denied right to see Amy.

Parents were served with a petition, which cited statute of neglect with no allegations of neglect, on January 18 to appear in Keene District Court on January 24 1984. There was no hearing due to Mr. Park's (Amy's attorney) failure to appear. Parents' attorney told them (parents were not permitted in the courtroom) that Welfare can't hold Amy without proof of charges of neglect, that he can't find any charges, seems Amy may be incorrigible and believes she will have to be released in two (2) weeks or so; then wanted the parents to sign an agreement. Parents refused, there are no witnesses and no investigation by Welfare of parents' home. The attorney then said it was necessary to have Amy follow rules imposed by the court,

it will take time for Welfare to draw up paper work to the court for Amy's release to parents' custody. The agreement was signed in an anteroom, no hearing, no judge, with parents agreeing to nothing but rules for Amy to follow.

Through the efforts of City Attorney, C. Morang and the Keene District Court Judge, J. Davis, it was held that Welfare placed Amy in an improper foster home; Welfare was directed to have Amy removed and such home be investigated.

Shortly thereafter, at Welfare's request, a meeting was held with the parents. Welfare said they made a mistake in taking custody of Amy, what parents said was the truth, that she is not following the rules therefore foster home is not the answer, it was wrong, her conduct is eratic and that the parents should place Amy in a hospital for evaluation. Welfare had a

Motion filed with the Keene District Court returning custody of Amy to her parents for the next court session of April 12.

Upon return of custody of Amy, petitioners noted a distinct change in Amy's personality and sought medical help for her injury, only to be hampered by the sixteen (16) year old male who lived at the foster home where Amy was improperly placed by Welfare, who induced and enticed Amy thus causing her to leave her home Friday, August 3, 1984 at 9:40 P.M. When parents realized she was not home, and, fearing for her health, the Keene Police were called for a possible runaway.

Amy was found near the residence of the brother of the 16 year old male by her father and brought back home.

Keene Patrolman Randall LaCoste, after parking the police car in the parents' driveway, appeared at the kitchen door and

was told that Amy was already home. Amy, at that time, was attempting to throw-up in the kitchen sink, saw the patrolman, became annoyed and briefly started to use foul language at her father in the total confines of her home. The patrolman, without a warrant, without permission from the parents, without probable cause, unreasonably forced entry by pushing the kitchen door from the parent's holding, entered petitioners' home where no offense was being committed. 5-10 minutes later, while on the second floor where Amy was not listening to the patrolman or using foul language but only mumbling to herself, which could not be heard on private or public property, the patrolman shouted at Amy to "Shut-up", then without probable cause, told her she was arrested, is his prisoner and is going to YDC. Without giving Amy or her parents the charge for the arrest

or reading Amy her Miranda rights, Patrolman LaCoste took Amy to the Police Station where she was detained overnight without a warrant or written pre-arraignment orders from a judge. She was not allowed to call her parents or her attorney, Mr. "O", but was interrogated.

Parents went to the police station, were told nothing but that the juvenile officer will call in the morning.

Parents' attempts to contact Mr. "O" Friday night and Saturday were futile.

At 8:50 a.m. Saturday, August 4, 1984, Sgt. H. Brown, juvenile officer, 'phoned the parents that there was to be a hearing at 9:00 and asked if Amy hit them.. the response was, "No, never!". Parents were not told where the hearing was to be held, that it was an arraignment, or given the reason for Amy's arrest or why she was being detained. Parents repeatedly insisted

upon being present, were told it was not necessary, would be better if they did not come, would be hard on the parents and would cause more trouble. Never clarified what trouble.

At 10:00 a.m. that day, Sgt. Brown 'phoned the parents and said he is taking Amy to YDC, she denied the charges, she willI have no record, will be detained for twenty-one (21) days.

Later that day, Amy called her mother several times begging to come home, does not know why she is at YDC, said they tried to find a placement for her, that there is to be a hearing on August 21, and asked to get the attorney to get her out.

On Monday August 6, 1984, parents were finally able to contact Amy's attorney told him to protect Amy and get her out of YDC, parents believe there is a mistake in Amy's arrest, were never told why Amy was

arrested in her own home by the police, and that Amy called home several times on Saturday. Mr. "O"'s reply was that she will learn that the grass is not greener on the other side. Mr. "O" was retained as Amy's attorney for the action against Welfare for Amy's injury, was given evidence of her injury and the fact that she may not be competent and could be further injured by her detention at YDC.

On August 24, 1984, parents, at Amy's request, visited her at YDC and later met with Mr. Adams, administrator, who related that he overlooked the psychological evaluation. Parents were never given written notice of such evaluation and of their right to object. Parents noted a distinct personality change in Amy. It was Amy, not the Keene District Court, who notified her parents that the hearing of August 21, 1984 was postponed to September 11, 1984.

Parents were given no notice by the court, written or otherwise of the hearing on September 11, 1984 or that it was an adjudicatory hearing. At the onset of the hearing, Amy's court appointed attorney, Mr. Park, City attorney, Mr. Bennett and Judge Talbot said that Amy was adjudicated not a delinquent. Parents then asked the Court, "On what grounds is she being held" and were ignored. A recess was called so that Mr. Archibald of Youth Services, Inc. (hereinafter YSI) could convince the parents who were adament to Amy being placed in a foster home, since, as stated by Mr. Archibald, custody was already given to YSI by Judge Talbot, MM Park and Bennett prior to the hearing, with a foster home set. Mr. Archibald further stated that Mr. Parento (Amy's school counselor, who, parents later found out was one of the founders of YSI) had already been in contact

with him and discussed Amy. (Exh 11b)

Judge Talbot, MM Bennett and Park ignored parents' constitutionally protected rights of custody, placed Amy with YSI without written notice of a petition given to the parents or grounds for terminating parents' physical and legal custody rights of their child, while Mr. "O" did nothing (saying only "she will run away again").

Right after the September 11 hearing and on subsequent dates, parents asked Mr. "O" to appeal. His response was that statute prevents appeal. Parents then asked him to file a federal action for violation of parents' constitutional rights, but Mr. "O" withdrew on September 18, releasing records to the parents.

Parents sought to see the files at Keene District Court to see just what the charges were for Amy's arrest, why she was still being held and the grounds by which

the court deprived the parents of their custody rights. They were denied access by the Clerk of the Court, Mr. Bennett and the presiding judge. Also denied them was the right to see the police reports.

In seeking to retain another attorney to handle the Welfare matter of Amy's injury, parents had him review the records given them by Mr. "O". It was then that they were aporised that there was a petition against Amy and asked if she ever hit them since that's what the charge is. When he was told what actually happened, he advised their contacting the juvenile officer who signed said petition and have the charges dismissed since they are false. On October 4, 1984, parent met with Sgt. Brown and made such request and also sent written request to him with copy to the Court and to Mr. Bennett. (Exh. 6b)

Parents find that they were never given

legally sufficient written notice of the petition of August 4, 1984 as required by NH RSA 169-B:7 and the U.S. Supreme Court in juvenile delinquency proceedings. The they are named by name as the recipients to the offense of disorderly conduct, NH RSA 644:2 against Amy to which the parents never filed a complaint, the parents were never called to court for confrontation or cross-examination. The arresting officer, Patrolman LaCoste, was not in court at the initial hearing of August 4 or at the hearing of September 11, 1984, and since Sgt. Brown was not a witness to the alleged offense, he could not offer testimony due to the fact that the offense never happened.

Parents question just who was in court at the initial hearing, and if there was a judge present. Statements were made at the February 13, 1985 hearing which raise doubts whether a judge or Mr. Bennett were

there. Sgt. Brown had said that Judge Hamosey made the order on August 4 whereby Amy was committed to YDC; the state's attorney for the judges say, "No, Judge Talbot presided". When the question of who made the order on August 4, 1984 for the City of Keene to be the legally liable unit for Amy's placement, Judge Talbot said he did not issue the order; while at the October 11, 1984 hearing, after parent recited the due process procedures in re Gault and showed parents were not served and that they are named as the recipients to the offense, were never called to court, that the offense is false, Judge Talbot questioned Mr. Bennett whether due process was met on August 4, to which Mr. Benett's response was, "I believe so".

Commencing on August 4, 1984 to June 21, 1985, parents were never given written notice of the petition of August 4, 1984

as required by law or of the statutory grounds for terminating parental rights defining the state's interest for taking custody of Amy to give to YSI as required by law, RSA 169-C or 169-D. Judge Talbot said "Amy is not a delinquent", therefore NH RSA 169-B, delinquency statute, no longer applied. There were no statutory grounds for holding Amy. Parents moved for return of custody which was continuously denied or ignored. The court was without personal jurisdiction over the parents to adjudicate the parents' rights and Amy's rights, being that the parents and Amy were never served with written notice of the petition of August 4, 1984, as required by NH statute and as required by the U.S. Supreme Court in re Gault 387 US 1, a copy of which was given to Judge Talbot at the October 11 hearing, which he ignored, refused to dismiss the action a-

gainst Amy for the court's failure to comply with the requirements of due process of the law, and that without the recipients in court at the initial hearing, the court had no case. Judge Talbot continued custody of Amy with YSI.

(b) Proceedings Below

Petitioners failed to obtain attorney to represent them due to the state court judges being involved, therefore, on November 1, 1984, acting pro se, they filed suit with the U.S. District Court, District of New Hampshire, under the Civil Rights Act § 1983; Federal Question Jurisdiction § 1331; Federal Jurisdiction predicated under § 1343(3); and certain amendments of the Constitution of the U.S. alleging deprivation of constitutionally protected rights, illegal seizure, abduction/kidnapping of parents' minor daughter Docket No. C84-697L.

Petitioners' action seeks, inter alia, injunctive relief and damages for deprivation of their Civil Rights under § 1983, obstruction of justice and deprivation of parents' "liberty" and "privacy" interests of custody rights of Amy protected by the Due Process Clause of the Fourteenth Amendment. The named defendants acted under "color of law" and were willful participants with the state, depriving the parents of procedural due process of the law and equal protection of the laws; where the state laws were unconstitutionally applied and ignored; where parents' custody rights and Amy's rights, guaranteed by the NH Constitution, were ignored; where there is "bad faith" in state juvenile delinquency proceedings and an irreparable injury which is both great and immediate and that the injury will not be dissipated in state proceedings, and where there is clear a-

buse of discretion and usurpation of judicial power; where there are private, prior agreements favoring defendants; where the parents were continuously denied access to the juvenile files and police reports, all of which deprived the petitioners of their rights secured under the Federal Constitution to defend their constitutionally protected rights, privileges and immunities under the Fourteenth Amendment, and subsequently the Fourth, Fifth, Sixth and Seventh Amendments.

Federal Court (Martin F. Loughlin, U.S.D.J.) issued its order on January 4, 1985 after partial hearing on January 2, 1985, stating that federal court has juridsiction for the violation of parents' due process rights; exhaustion of remedies is not an issue; parents have no appellate rights in state court; injnctive relief is appropriate after prosecutorial stage;

Judge Talbot's placement of Amy to YSI was clearly illegal relative the parents' due process rights; oral notice is insufficient, due process of the law requires written notice of the petition given to the parents sufficiently in advance of the initial hearing to allow preparation, parents' due process rights were violated, Keene District Court to comply with due process given to parents as in re Gault; ordered Amy be returned to the custody of her parents. The order was never received by the Keene District Court. At the January 2 hearing, Judge Loughlin directed state attorney for the judges to have Keene District Court release Amy's files to parents and that Mr. Bennett release police reports on Amy (which he had taken from the juvenile files to give to his attorney, Mr. Shea) to her parents. At this hearing, upon parents' Motion to Produce,

all defendants, through their attorneys, admitted, under oath, that parents were not served written notice of the petition of August 4, 1984.

On January 8, 1985, petitioners were orally notified by the U.S. District Court Clerk, James R. Starr, that the State Attorney called and said Judge Loughlin made several errors in his January 4 ruling and that Judge Loughlin will call said attorney to discuss the matter. Thereafter, Judge Loughlin secretly met with Amy (who is not a party) in his chambers, without parents' permission, without counsel and withheld all information from her parents.

State attorney's Motion for Stay dated January 8, 1985 was granted, ex parte, January 9 by Judge Loughlin, without notice to petitioners of the Motion, their right to object and without permitting petitioners their due process right to know

upon what issues and errors Judge Loughlin based his decision. With the information secretly withheld by Judge Loughlin, petitioners were denied the right to rebut the Amended Order wherein, citing frivolous, meritless and irrelevant custody cases, as between parents, as basis in his decision for dismissing parents' Civil Rights action, precluded parents of their right to prosecute their constitutional claims, and contrary to his previous order, Judge Loughlin remanded to state court. Petitioners moved for Stay and Clarification and for a hearing, all were ignored.

Petitioners filed an appeal with the First Circuit Court of Appeals.

In its Memorandum and Order, the First Circuit states: "While the January order was to abstain on the injunctive aspects of the case since, there having been no removal there could be no remand", and

sent the case back to federal court.

Case was re-opened - Judge Loughlin dismissed the action because defendants say federal court does not have jurisdiction over custody cases. Petitioners say this is not a custody case per se, it is a Civil Rights action by the parents against the State and willful participants who unconstitutionally deprived these parents of their Custody Rights protected by the Due Process Clause of the Fourteenth Amendment of the Constitution. Judge Loughlin made reversible errors in violation of petitioners' constitutional and legal rights, repugnant to the Constitution and laws of the United States, as cited authorities in petitioners' Motion to Reconsider and for Stay, which was ignored. By granting immediate approval to state attorney, ex parte, Judge Loughlin further deprived petitioners of equal rights. Where Judge

Loughlin, in his prior order stated that the placement of Amy to YSI was clearly illegal, he continues to aid and abet in the illegal seizure and of kidnapping of Amy by permitting her to stay at YSI foster home, being induced and enticed by YSI, permitted nomadic ways and allowed to drop out of school in her senior year, saying she is of age to choose where she wants to live. Such acts are repugnant to parents' right secured by the U.S. Constitution and under N.H. laws, are wrongful acts, not of the authority of a federal judge who breached impartiality with the state attorney to favor said attorney, where the state had no personal jurisdiction over the parents and Amy; and "under color of law" had deprived petitioners of their constitutional rights in violation of 42 USC § 1983 for which there is no judicial immunity.

Petitioners appealed to the First Circuit.

Without affording petitioners oral argument of their constitutional claims for transcript for the record, the First Circuit, in affirming the lower court's judgment that it does not have jurisdiction, was clearly violative of petitioners' constitutional and legal rights in authorities cited in their Briefs. The First Circuit's decision nullified all cited Amendments of the Constitution and laws of the United States, disregarded the decisions of other federal and appeals courts of the same essential matters and the landmark decisions of the U.S. Supreme Court. The First Circuit has no jurisdiction or authority to act as a trial court, act as attorney upon issues that were not tried in the lower court, and completely without jurisdiction and authority to unlawfully

used confidential juvenile information and records to defame the parents with libel of abuse and neglect, with total disregard for the truth. They impaired and modified the already perjured petition charge of August 4, 1984 against Amy, by which she was committed to YDC, which was fatally defective as being unconstitutionally vague, as an arrest for an alleged offense committed on public property, RSA 644:2, to read RSA 644:2(III)(a) as an arrest for an alleged offense committed on private property, which is still perjured and false for reason the offense never happened. Stating that Amy's swearing in the confines of her own home, which did not disturb anyone, offends the First Amendment and therefore is probable cause for the patrolman to force entry into parents' home in violation of constitutionally protected rights, unreasonably seize parents'

minor daughter; remove her from their home without notifying the minor or her parents of the charge for her arrest; detain her at the police station without pre-arraignment orders signed by a judge; deny her the right to call her parents or her attorney; interrogate her without parents or counsel present; never read her her Miranda rights; never serve Amy with written notice of the petition of August 4, 1984; after a plea of "Not True" was entered, the minor was imprisoned for 39 days, which the First Circuit says was legal. It further stated parents don't have to be served written notice of the petition as required by law, NH RSA 169-B:7 to appear in court for the hearing of August 4, 1984, and as required by the U.S. Supreme Court in re Gault; though they are named as recipients to the offense and necessary parties to confer personal jurisdiction

upon the court to act, parents do not have to appear in court for confrontation and cross-examination at the initial hearing of August 4 and as witnesses; the arresting patrolman's appearance is not necessary in court at the initial and adjudicatory hearings; that a judge and prosecuting attorney are not necessary at the initial hearing; there is nothing wrong with Sgt. Brown perjuring the petition charges and falsely naming parents as recipients to an offense which never happened; that the parents don't have to see the court files and the police reports for the charges for Amy's arrest; the State can deprive the parents of their minor daughter without written notice of the issues parents are to meet. All parties to petitioners' action are immune under § 1983. YSI can do as it pleases with parents' child, permit illegal and immoral acts

upon this incompetent child, and collect $800. - $925.00 per month from the parents for the placement. Since YSI is a "non-profit, charitable" corporation, Appeals Court says YSI is not acting "under color of law". Petitioners say the conduct of these Appeal Court judges abrogate all human decencies, are wrongful acts viable for redress under the Federal Tort Claims Act, and for aiding and abetting in State's illegal seizure and kidnapping of parents' minor daughter. That when the child was injured, hospitalized, YSI said they are not liable, "the parents are liable, they have legal custody". Petitioners say the First Circuit's affirming the decision of the lower court is clearly an abdication of duty of the appellate court to correct the lower court's reversible errors which deprived parents of their constitutionally protected rights.

REASONS FOR GRANTING THE WRIT

Patrolman LaCoste forced entry into parents' home without probable cause, where no offense was being committed, unreasonably arrested parents' minor child; removed her from her own home; detained her at the police station without notifying parents or the minor of the charge for the arrest, violated parents' and Amy's Fourth Amendment rights of:

> "the right of people to be secure in their persons, house, papers, and effects against unreasonable searches and seizures, shall not be violated."

Bevins v Six Unknown Agents 463 US 388; Monroe v Pape 365 US 167; Payton v New York 445 US 573; Mapp v Ohio 367 US 643; Johnson v U.S. 333 US 13; Beck v Ohio 379 US 89; State v Morse 125 NH 403; State v Chaisson 125 NH 810 (LaCoste).

> "there is no "good faith" in the validity of an arrest without a warrant" and for unlawful arrest without an offense committed. Anno 26 A.L.R. 286

Beck v Ohio, supra; Sexton v Gibbs 327 F.Supp 134; Basista v Weir 340 F2d 74 (3rd Cir. 1965); Peterson v Stanczak 48 F.R.D. 429; U.S.C.A. Const. Amend. 4.

There were no pre-arraignment orders signed by a judge for her detention (Exh. p 3b, petition of August 4, 1984); was denied the right to call her parents and her counsel; was interrogated in violation of her rights under Miranda v Arizona 384 US 436, that all information unconstitutionally seized is inadmissible as in Mapp v Ohio, supra; State v Morse, supra; State v Benoit 126 NH 6 (1985); U.S.C. Amend. 4.

Sgt. Brown's oral notice at 8:50 a.m. Saturday, August 4, 1984 of a hearing at 9:00 that day, without specifics or of the allegations, does not meet due process of the law (app. p 5a, 6a). NH RSA 169-B:7 requires the court to issue summons to the parents with petition attached to appear

in court as in re Russell C 120 NH 260; DiPietro v Lavigne 98 NH 294; in re Poulin 100 NH 458; and as required by the U.S. Supreme Court in re Gault 387 US 1.

> "(1) Written notice of the specific charge or factual allegations, given to the child and his parents or guardian sufficiently in advance of the hearing to permit preparation"

Parents were not served notice of the petition of August 4, 1984 (Exh. p 2b)(app at 5a) as required by law and as in re Gault, supra. See Roe v Conn at 780 (14)

The petition names the parents as recipients to the offense, that Amy was fighting and having physical contact with her parents, Henry and Julia Malachowski (Exh 1b) is a lie!; is fatally defective under RSA 169-B:6; lacking in particularity; void for vagueness. State v Mealey 100 NH 228, and is contrary to the August 3, 1984 police report. NH RSA 644:2 contains a number of different offenses, all of which

are characterized with the intent to disturb the public. State v Laponsee 115 NH 56; State v Nickerson 120 NH 821. Amy was in her own home expressing free speech at her parents who did not file a complaint. There was no intent to disturb the public. Such free speech in her own home is under protection of the 1st and 4th Amendments and N.H. Constitution, part 1, Art. 19.

> "Cursing in the presense of a police officer is considered protected speech under the U.S. Constitution (U.S.C.A. Amend. 1)"

Lusk v Roberts 611 F.Supp 564; State v Nickerson, supra.

At the initial hearing of August 4, of which parents were given no written notice of the petition to appear in court, and as in re Gault, supra; where parents' custody rights were at stake at 550 and as in Stanley v Illinois 405 US 645; Amy was not given written or oral notice of the petition

of the charge by the court. Recipients were not summoned (Exh p 1b); arresting officer was not in court; Sgt. Brown, as the petitioner could not offer testimony or offer proof beyond a reasonable doubt, RSA 169-B:17, he was not a witness and his testimony would be inadmissible, as in re Gault at 562, footnote 98; in re Russell C supra; Kennedy v Meara 127 Ga 68; McEntee v Lynch 223 Ill 346; Ex parte Molloy 122 Va 298; Karrib v Bailey 212 Mich 502; Sharp v State 240 Miss 629; Ex parte Naccarat 328 Mo 722; in re Poulin, supra. Prosecution did not obtain witnesses, Barber v Page 390 US 719; Right to Confront Witnesses 23 L Ed 853; Pointer v Texas 380 US 400; Boykin v Alabama 25 L Ed 274; Molloy v Hogan 378 US 1; in re Gault, supra; Garner v Louisiana 368 US 157, "as devoid of evidence"; Hedgwood v Kindrik 264 F.Supp 720; Motes v U.S. 178 US 458. Without the recip-

ients at the initial hearing, the court had a duty to dismiss the action as in re Gault, supra, and for lack of personal jurisdiction over the recipients to adjudicate their rights and Amy's rights as in Meyer v Nebraska 262 US 390; Prince v Massachusetts 321 US 158; for failure to make a prima facie case. See Shore v Howard.

In Kinney v Lenon 425 F2d 208 (8th Cir. 1970) ordered the minor released to the parents to seek witnesses as in Washington v Texas 388 US 14 as a due process right under the 6th Amend. and as in re Winship 397 US 358 at 958 Sect. 6, Right to Bail or Release from Detention, RSA 169-B:11. Amy's parents were the only persons who could aid her to resist the perjured petition charge signed by Sgt. Brown, was without probable cause hearing, Gerstein v Pugh 420 US 103; Amy was deprived of her liberty at YDC and parents were deprived

of their custody rights on a plea of "Not True" for 39 days, violating the maximum period for detention of 21 days mandated by RSA 169-B:14 II, see Eric C 124 NH 222 where the court forfeited jurisdiction after 21 days due to the fault of the state; was cruel and unusual punishment, U.S.C.A. 5th and 8th Amend.

Suppression of exculpatory evidence (theft by Mr. Bennett) favorable to Amy's acquital and return of her custody, is not within the scope of prosecuting attorney's duties - for which there is no immunity - as in Hilliard v Williams 516 F2d 1344 (6th Cir. 1975); Haaf v Grams 355 F.Supp 542. It is not within the scope of prosecuting attorney, clerk of the court and presiding judge to deprive petitioners of their right under RSA 169-B:35 to see the court files to defend the action, depriving parents of constitutionally protected

rights in violation of § 1983. Defendants permitted the perjured petition charge against Amy. All defendants had copies of the petition and the police report. In Mooney v Holohan 294 US 103

> "The Constitutional requirement of due process is not satisfied where a conviction is obtained by the prosecution of testimony known to the prosecuting authorities to be perjured."

as in Brady v Maryland 373 US 83, as being violative of due process; which deprived parents of their custody rights.

All defendants were wilful participants in joint activity with the state or its agents; see U.S. v Price 383 US 783; Perez v Sugarman 499 F2d 761 (2nd Cir. 1974)

> "in accepting and retaining custody of children alleged to have been "neglected" or "abandoned", private child caring institutions perform a "public function" and there is thus "state action" within the meaning of Civil Rights act, 42 USCA § 1983".

In Auster Oil & Gas Inc. v Stream 764 F2d 381 (5th Cir. 1985)

> "Nominally private conduct constitutes "state action" if connection between state and acts justifies treating private actor as agent of the state...a private party acts under color of law if her behavior makes her a willful participant in joint action with the state or its agents. 42 USCS 1983"

In violation of due process of the law, where state statutes are vague and unconstitutionally applied, ignored as in Mitchum v Foster 407 US 225 under § 1983 and § 2283; Newton v Burgin 363 F.Supp 783; Conover v Montemuro 477 F2d 1073 (3rd Cir. 1972-73); Alsager v District Court 518 F2d 1160 (8th Cir. 1975). Abstention is improper under Younger v Harris 401 US 37, only applies to prosecutorial stage in juvenile delinquency proceedings. Judge Talbot said Amy is not a delinquent. There is no exhaustion of remedies under §1983.

Petitioners are entitled, as in Alsager supra at 1165, to have federal court find those facts necessary for a decision on

their constitutional claims as in Newton v Burgin, supra; Madison v Purdy 410 F2d 99 (5th Cir. 1969) to injunctive relief. It's the parents' rights which are before federal court as in Alsager 406 F.Supp 10 at 16, footnote 3; in Newton v Burgin at 785, 786 and as mandated by U.S. Supreme Court in re Gault in juvenile delinquency proceedings. Petitioners have a right to injunctive relief where there is deprivation of parents' custody rights protected by the Due Process Clause of the 14th Amend.; is an irreparable injury which is both great and immediate and that injury will not be dissipated in state court juvenile proceedings where there is "bad faith" and concerted overt acts. Hoffman v Halden 268 F2d 280 (9th Cir. 1959); U.S. v Price 383 US 787 as to conspiracy.

By private, prior agreement, Judge Talbot, MM Bennett, Park and YSI, as willful

participants, where physical custody of Amy was held at YDC under RSA 169-B, as in State v Bryan 123 NH 420, Sgt. Brown, petitioner, could not prove the case beyond a reasonable doubt; RSA 169-B:17 as in State v Robert H 118 NH 713, "legal supervision was given to YSI" (Exh p 4b)"without clear showing" as in State v LeFebvre 91 NH 382, terminated parental rights without instigating statutory grounds, deprived parents of constitutional rights in violation of § 1983. The court had no personal jurisdiction over the parents and Amy, it lacks all jurisdiction to adjudicate the parties rights, are not judicial acts for purpose of judicial immunity. Rankin v Howard 633 F2d 844 (9th Cir. 1980), there could be no enforceable order that can be entered, are hence, null and void. Manning v Ketchum 58 F2d 948 (6th Cir. 1932) as CORAM NON JUDICE; as in Gault, supra; in Poulin, supra

DiPietro v Lavigne, supra; Doe v County of Lake, Indiana 399 F.Supp 553, where

> "A judge can be sued for failing to perform administrative acts in violation of the constitutional rights of certain citizens."

Judge Talbot, in concerted, overt acts with all named defendants, made private, prior agreements "under color of law" to give parents' custody rights of Amy to YSI, is unconstitutional, deprived parents of due process of the law to rebut, confront the issues in which he made his decision. See Escalera v N.Y. Housing Authority 425 F2d 853 (2nd Cir. 1970) citing Goldberg v Kelly 397 US 254, and has unconstitutionally continued placement with YSI through Amy's minority, deprived parents of rights in violation of §1983; §1331; §1343(3) and the 14th Amend. of the U.S. Constitution.

Amy was never given written notice of the petition against her. 25 L Ed 2d 956

at 960 9, Right to Confrontation and Cross-examination.

> "Absent a valid confession, a determination of delinquency and an order of commitment to a state institution cannot be sustained in absence of sworn testimony subjected to the opportunity for cross-examination in accordance with the law and constitutional requirements, as in Gault, the court overturned a state court determination of delinquency."

In the instant action, the recipients to the alleged disorderly conduct offense, Henry and Julia Malachowski were not called as witnesses (Exh p 1b, 2b),the arresting officer was not present, Sgt. Brown was not witness and could offer no testimony, there was no evidence, the offense was perjured, precludes a plea of "chargeable" or "guilty". Parents were at all time in court at September 11, 1984 hearing; the issues of the offense were never raised. Neither Amy or her attorney made a plea of "chargeable" or "guilty", clearly

violated Amy's rights under the 5th Amend. of the U.S. Constitution and NH Const., Part 1, Art 15, depriving Amy of her liberty without due process of law for an offense that never occurred and was perjured; Boykin v Alabama 25 L Ed 2d 274, citing Woods v Rhay 68 Wash 2d 601; Faretta v California 422 US 806, "never notified of the charge"; Lego v Twomey 404 US 477, "unless where waiver was obtained"; petitioners argue there was no written waiver on record; Molloy v Hogan 378 US 1, "without evidence, admissibility of plea is void"; McKeiver v Penn. 403 US 528, "as a waiver of rights"; McCarthy v U.S. 394 US 459, "where trial judge must inquire to a plea"; parents say there was no hearing, no judge. In Brâmlet v Peterson 307 F.Supp 1311,

> "record must affirmatively show that a guilty plea is knowingly and voluntarily made"

Parents contend Amy was never given or

made known the petition charges against her, she was continuously told by her attorney that she is a delinquent for running away and swearing, was never told the meaning of appeal, RSA 169-B:29, said attorney acted as a willful participant, in concert with Judge Talbot, depriving Amy of constitutional rights and her parents' rights of custody, in violation of § 1983; § 1331; USCA 14 Amend.

The City of Keene, City Attorney, Sgt. Brown and Patrolman LaCoste are not immune from suit brought under the 4th and 14th Amend. and statutes providing for federal question jurisdiction; § 1331; § 1983; § 1343 (3). See American Civil Liberties v City of Chicago 431 F.Supp 25 at (3-4); Llaguno v Mingey 763 F2d 1560 (7th Cir. 1985), for 4th Amend. violations. See Bush v Lucas.

All through the litigation, Amy was never read her Miranda rights to remain si-

lent; the court, on its own motion, should have dismissed the action against Amy on August 4, 1984. Sgt. Brown is not the recipient named in the petition, therefore he could not be the petitioner. The recipients were not called to court as in Gault; the court had no case.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

June 24, 1986

Respectfully submitted,

Henry Malachowski Pro Se

HENRY MALACHOWSKI-Pro Se

Julia Malachowski - Pro Se

JULIA MALACHOWSKI-ProSe

APPENDIX

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Henry Malachowski, et al.

v. #C84-697-L

City of Keene, et al.

ORDER OF THE COURT

The court had before it the following motions which are listed succinctly as follows chronologically:

Plaintiff's Motion for Temporary or Permanent Restraining Order

State Judge Defendants' Motion to Dismiss

City Keene, et al. Defendant's Motion for Discovery of Other Court Records, or for Protective Order, or for Dismissal

Plaintiff's Motion to Strike

Defendant Youth Services Motion to Dismiss

Plaintiff's Motion for Default Judgment

Plaintiff's Motion to Produce

There are a plethora of pleadings in this case. As best the court can ascer-

tain the following facts are uncontroverted.

Amy, adopted daughter of the pro se plaintiffs is a juvenile. She was born on April 3, 1968 and has lived with her adoptive parents since her infancy of eleven months.

The plaintiffs were very upset about her relationship with one Stephen D. because of alleged drug involvement.

August 3, 1984, Amy left plaintiffs' home and the Keene Police were called.

Henry Malachowski returned to his home on Friday, August 3, 1984 with daughter Amy at 10:00 P.M.. Patrolman Randall LaCoste, a defendant entered plaintiffs' home in Keene. Amy directed foul language at her father. LaCoste arrested Amy.

On Saturday, August 4, 1984 without prior notice to the plaintiffs who had not signed any complaint said complaint being

signed by H. Brown, Sergeant of the Keene Police Department, a defendant, Amy, upon order of the court (Talbot, J.) was taken to the Youth Development Center in Manchester. She remained there until August 21, 1984. The plaintiffs were not present at the court session of August, 1984.

Plaintiffs were present at court sessions on September 11, October 11 and December 27, 1984.

Since September 11, 1984 Amy has resided in two foster homes. She is currently a student at Thayer High School in Winchester which is just south of Keene.

Some of the following facts may be controverted.

Defendant, Youth Services, Inc. of the Monadnock Region hereinafter referred to as (YSI) foster home child care service had custody of Amy on September 11, 1984 and allegedly it or the Keene District

Court has continuing custody.

The allegations set forth in paragraphs 2, 3, 4 and 5 of plaintiff's affidavit filed November 13, 1984 are matters to be presented at an evidentiary hearing.

The court finds that the plaintiffs were not given any notice relative to the August 4, 1984 hearing.

Additionally, RSA-169B:35 states,

> ...Except as provided in RSA 169-B:24 and RSA 169-B:39, all records pertaining to cases of delinquency shall be kept at all times so that no one shall have access to the same except officers of the institution where the minor is committed, duly accredited probation officers, parent, guardian, custodian, minor's attorney, and others entrusted with the corrective treatment of said minor. Additional access may be granted by court order or upon the written consent of the minor. Once a delinquent reaches 19 years of age, all court and individual institutional records including police records shall be sealed and placed in an inactive file.

The court further finds that the parent plaintiffs were denied access to Amy's

records although they repeatedly requested said records in violation of said statute. Counsel for the state has agreed to rectify this by sending a copy of Amy's records to the parent plaintiffs as soon as possible.

The agreed facts indicate some denial of the parents due process rights. An initial arraignment hearing was held on August 4, 1984 pursuant to RSA 169-B:13. The Supreme Court requires procedural safeguards at this stage. In Re Gault, 387 U.S. 1 (1967). As in Gault, the parents allegedly received oral notice at 8:50 A.M. August 4, 1984 that a hearing would be held at 9:00 A.M. that day. Notification of the initial hearing and no written notice of the specific allegations were given to them. Id. at 31. The officer here made representations that the

parents' presence was not necessary.

> ...The "initial hearing" in the present case was a hearing on the merits. Notice at that time is not timely; and even if there were a conceivable purpose served by the deferral proposed by the court below, it would have to yield to the requirements that the child and his parents or guardians be notified, in writing, of the specific charge or factual allegations to be considered at the hearing, and that such written notice be given at the earliest practicable time, and in any event sufficiently in advance of the hearing to permit preparation. Due process of law requires notice of the sort we have described--that is, notice which would be deemed constitutionally adequate in a civil or criminal proceeding.

Id. at 33. The parents were denied their due process.

On September 11, 1984 Judge Talbot ordered that a YSI foster home take custody of Amy without instigating a neglect or CHINS petition. RSA 169-C and 169-D. The Judge acted on the original delinquency petition. RSA 169-B:19 and rights to due process forbid a child adjudicated as de-

linquent to be placed in a foster or group home used for the placement of neglected or CHINS petition child. See, In re Arnold H., 121, N.H. 759 (1981); Shone v. State of Maine, 406 F.2d 844, 47-49 (1st Cir. 1969). Such a change in placement requires full due process safeguards of prior written notice. Shone, supra, at 847. The placement to YSI by the adjudicatory hearing of September 11, 1984 was clearly illegal relative the parents' due process rights. (Ex I, id. p.2).

The question is whether this court has jurisdiction and whether the district court or YSI have absolute immunity from injunctive relief under a 28 U.S.C. § 1983 action.

Exhaustion of state remedies is not an issue here. The minor child alone has appellate rights, RSA 169-B:29. The guardi-

an ad litem and attorney representing her both refused to recommend an appeal. The court finds that it does have jurisdiction for the federal constitutional violation pursuant to 28 U.S.C.§ 1331 as a 42 U.S.C.§ 1983 action. In the motion for preliminary injunction, the named defendant, Youth Services, Inc. claims absolute derivative judicial immunity because it acted pursuant to a Keene District Court order. Stump v. Sparkman, 435 U.S. 349 (1978). The attorney general also appeared at the hearing on behalf of the defendant judges.

The plaintiffs at this point seek a preliminary injunction to regain physical custody of their child. In a Section 1983 action, this court may enjoin a criminal proceeding in state court and is not barred by the anti-injunction statute, 28 U.S.C.§ 2283. Younger v. Harris, 401 U.S. 37 (1971); Mitchum v. Foster, 407 U.S. 225

(1971).

Additionally, the application of judicial immunity is not absolute.

> ...The application of the doctrine of judicial immunity is restricted to its single objective of protecting judicial freedom in the process of deciding civil and criminal cases. Where the initiative and independence of the judiciary is not effectively impaired, the doctrine of judicial immunity does not hold.

Shore v. Howard 414 F. Supp. 397, 385; (N.D.Tx. 1976). A judge may be enjoined for failing to perform administrative acts in violation of the constitutional rights of certain citizens. Bramlett v. Peterson 307 F.Supp. 1311 (M.D.Fla 1969). The same applies to failures to perform ministerial duties. Ex Parte Virginia, 100 U.S. 339 (1879) as cited in Shore v. Howard, supra at 385.

Equitable complaints have been allowed against judges responsible for the administration of their youth detention system.

Doe v. County of Lake, Indiana, 399 F.Supp 553 (N.D.Ind. 1975); Santiago v. City of Philadelphia, 435 F. Supp. 136, 146 (E.D. Pa. 1977).

Finally, a judge who acts in clear absence of all jurisdiction may be enjoined. Stump v. Sparkman, 435 U.S. 349 (1978).

Although Judge Talbot's placement may have been illegal, the district court judge does have a broad jurisdictional grant over the best interests of the minor child similar to the probate judge in the Stump case. Id. at 357. The court declines to find a clear absence of all jurisdiction.

The failure of Judge Talbot to ensure that the parents of Amy M. received prior written notification of the charges was a dereliction of his administrative duties. The judge had a duty to safeguard the fundamental rights of the custodial parents,

apart from his judicial capacity to try and sentence the minor child. In Re Gault supra; Stanley v. Illinois, 405 U.S. 645 (1971). The remedy for a violation of administrative duties is limited to an injunction that in the future the Keene District Court respects the right of the plaintiffs. See, Doe, supra, Santiago, supra. The plaintiffs were afforded notification and were present at the adjudicatory and dispositional hearing. The court notes that in one case where the parents were not notified, that was insufficient grounds to reverse the conviction of the juvenile where all other procedural requirements from In Re Gault were satisfied. United States v. Watts, 513 F.2d 5 (10th Cir. 1975). The court rejects the contention that adjudication of the petition is null and void.

The placement of Amy was not an admin-

istrative act. It was the result of a dispositional hearing when a guardian ad litem, attorney for the parents, and the parents were present. This is clearly distinguishable from administrative duties over conditions at the pretrial juvenile detention centers as found in Doe v County of Lake Indiana, supra.

Judge Talbot maintains jurisdiction over Amy. No administrative agency such as Y.D.C. made the placement in the present foster home. The situation may only be characterized as on-going state court criminal proceedings.

Federal injunctive relief against a state court proceeding can, in some circumstances be essential to prevent great, immediate and irreparable loss of a person's constitutional rights. Mitchum v. Foster, supra, at 242. The Third Circuit has aptly pointed out that the Younger v.

Harris type abstention only applies to the prosecutorial stage of a juvenile court proceeding. Conover v. Montemuro, 477 F. 2d 1073 (3rd Cir. 1973). The requested relief here will not adjudicate an issue which on the basis of collateral estoppel might affect the state prosecution. Id at 1080.

The Pullman type abstention is also not appropriate because the state law is not ambiguous and clearly forbids the act by Judge Talbot. Id., 1083.

The elements for an injunction are present. There is no adequate remedy at law for the parents because they had no appellate rights. Secondly, any loss of physical custody of a child by the parents due to an unconstitutional state court act would cause irreparable harm. Stanley v. Illinois, supra at 647. The situation here is akin to that in Stanley where the

state attempted to circumvent neglect proceedings by denying the right of prior hearing before children were taken from an unwed father's custody upon the death of the mother. Id. 649-50.

The following orders are made to fashion a remedy which would prevent deprivation of constitutional rights of the plaintiff while at the same time avoiding unnecessary encroachment on state and local government functions. Conover v. Montemuro, supra at 1082.

1. The Keene District court shall ensure that the parents of accused juvenile delinquents receive service of the petition prior to an initial hearing and otherwise abide by the procedures set forth in In Re Gault.

2. The Keene District Court shall order that Amy be returned to the custody of her parents, without prejudice to in-

stituting proper procedures if the juvenile court deems it apposite.

The court rules "See order of today's date" on the following motions: Motion for order dated December 18, Motion to produce dated November 29, 1984, and Response to City of Keene Defendants' Motion for discovery dated December 10, 1984.

So Ordered

January 4, 1984

Martin F. Loughlin
U.S. District Judge

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Henry Malachowski, et al.

v. #C84-697-L

City of Keene, et al.

ORDER ON PENDING MOTIONS TO DISMISS

The plaintiffs have brought a 28 U.S.C. § 1983 action and constitutionally based actions against numerous defendants. The controversy arose from a juvenile delinquency proceeding against the daughter of the plaintiffs, Amy. The defendants, Monadnock Youth Services, Inc. (Y.S.I.) and Judges Talbot and Hampsey have filed motions to dismiss.

These motions were argued in conjunction with those disposed of in the Order of the Court, #C84-697-L, dated January 4, 1984, in the above-captioned matters.

The facts are in essence repeated herein.

There are a plethora of pleadings in this case. As best the court can ascertain the following facts are uncontroverted.

Amy, adopted daughter of the pro se plaintiffs is a juvenile. She was born on April 3, 1968 and has lived with her adoptive parents since her infancy of eleven months.

The plaintiffs were very upsey about her relationship with one Stephen D. because of alleged drug involvement.

August 3, 1984, Amy left plaintiffs' home and the Keene Police were called.

Henry Malachowski returned to his home on Friday, August 3, 1984 with daughter Amy at 10:00 P.M.. Patrolman Randall LaCoste, a defendant entered plaintiffs' home in Keene, Amy directed foul language at her father. LaCoste arrested Amy.

On Saturday, August 4, 1984 without

prior notice to the plaintiffs who had not signed any complaint said complaint being signed by H. Brown, Sergeant of the Keene Police Department, a defendant, Amy, upon order of the court (Talbot, J.) was taken to the Youth Development Center in Manchester. She remained there until August 21, 1984. The plaintiffs were not present at the court session of August, 1984.

Plaintiffs were present at court sessions on September 11, October 11 and December 27, 1984.

Since September 11, 1984 Amy has resided in two foster homes. She is currently a student at Thayer High School in Winchester which is just south of Keene.

Some of the following facts may be controverted.

Defendant, Youth Services, Inc. of the Monadnock Region hereinafter referred to as (YSI) foster home child care service

had custody of Amy on September 11, 1984 and allegedly it or the Keene District Court has continuing custody.

The material facts alleged in the complaint are to be construed in the light most favorable to the (non-moving party), and taken as admitted with dismissal ordered only if the (non-moving party) is not entitled to relief under any set of facts they could prove. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969); Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Harper v. Cserr, 54 F.2d 1121, 1122 (1st Cir. 1976). Upon review of a complaint before receipt of any evidence, the issue is not whether the (non-moving) party will ultimately prevail or is likely to prevail, but is whether the (non-moving) party is entitled to offer evidence to support the claims. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

The court has reviewed the allegations against Youth Services, Inc. The court finds no factual allegations which indicate state action as required by 28 U.S.C. § 1983 and the fourteenth amendment. Monroe v. Pape, 365 U.S. 167 (1961); Lugar v. Edmondson Oil, 457 U.S. 922, 932 (1981). The text of § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(emphasis added).

The plaintiffs allege that Y.S.I. and its agent, Richard Archibald, maintian an office in the Keene City Hall and act under color of state law.

The Articles of Incorporation of the

Monadnock Youth Services, Inc. exhibit 3 (id.), indicate that it is a non-profit and charitable organization.

In Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) the court identified three factors to be considered in determining whether particular conduct constitutes "state action":

a. There must be "sufficiently close nexas between the State and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the State itself," and

b. The nexas must be such that the state "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state," and

c. The entity has exercised powers "that are 'traditionally the exclusive prerogatives of the state.'"

The public function of Y.S.I. to provide foster homes for state agencies does not constitute state action. Rendell-Baker v. Kohn, 102 S. Ct. 2764, 2772 (1982).

Y.S.I. by the factual allegations of the plaintiff merely made studies and recommendations to the juvenile court and ran foster homes. The judge retains all authority of decision making. Therefore Y.S.I. does not have a badge of authority of the state. Monroe v. Pape, 365 U.S. 167 (1961). The mere conclusory statement that Y.S.I. acted under color of state law is insufficient.

This situation is distinguishable from the line at attachment cases leading up to Lugar v. Edmondson Oil Co., 457 US. 922 (1981). Y.S.I. did not act in accordance with statutory procedures which denied due process. Id. at 934. The RSA 169:B procedures are sound. The district court defendant judge had the sole responsibility to protect the rights of the parents. the role of Y.S.I. in the judicial process is akin to that of a public defender. See

Polk Country v. Dodson, 454 U.S. 312 (1981).

The motion to dismiss by Y.S.I. is granted without prejudice to any state court actions.

This court lacks in personam jurisdiction over the defendant, Richard Archibald. He is absent from the jurisdiction and has received no service of process. Fed. R. Civ. P. 4. The action against this defendant is dismissed without prejudice by motion of the court. Fed. R. Civ. P. 12(a).

The two Keene District Court Judges, Talbot and Hampsey have filed a motion to dismiss based upon judicial immunity. Insofar as the complaint prays for prospective injunctive relief, the motion to dismiss is denied. See, Order of the Court, #C84-697-L dated January 4, 1985.

The motion to dismiss is granted relative to any damage claims. The court, as

stated in the order granting preliminary injunction, does not find a clear absence of jurisdiction on the part of the defendant judges. Stump v. Sparkman, 435 U.S. 349 (1978). The motion to dismiss is granted for monetary damages.

January 8, 1985.

Martin F. Loughlin
U.S. District Judge

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Henry Malachowski, et al.

v. #C84-697-L

City of Keene, et al.

AMENDED ORDER OF JANUARY 4, 1985

The court on January 4, 1985 made an order; said order was stayed upon application of the defendant on January 9, 1984.

It is firmly established that the federal courts do not have diversity jurisdiction to grant divorces, determine alimony and support obligations, or resolve the conflicting claims of divorced parents to the custody of their children. See, e.g., Cole v. Cole, 633 F.2d 1083 (4th Cir 1980); Solomon v. Solomon, 516 F.2d 1018, 1021-26 (3rd Cir.1975) Buechold v. Ortiz, 401 F.2d 371, 372 (9th Cir. 1968). Sutter v. Pitts, 639 F.2d 842, 843 (1st Cir. 1981).

Reference is made to RSA 458-A:2 subsection II.

II. "Custody determination" means a court decision and court orders and instructions providing for the temporary or permenent custody of a child, including visitation rights.

III. "Custody proceeding" includes proceedings in which a custody determination is at issue or is one of several issues including any action or proceeding brought to annul a marriage or to declare the nullity of a void marriage, or for a separation, or for a divorce, but not including proceedings for adoption, child protective proceedings or proceedings for permanent termination of parental custody, or proceedings involving the guardianship and custody of neglected or dependent children.

RSA 458-A:3 relates to jurisdiction to make child custody determinations and reference is made to I(b) and (c).

(b) It is in the best interest of the child that a court of this state assume jurisdiction because (1) the child and his parents, or the child and at least one contestant, have a significant connection with this state, and (2) there is within the jurisdiction of the court substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or

(c) The child is physically present

> in this state and (1) the child has been abandoned or (2) it is necessary in an emergency to protect the child;

The court stayed its order because of a request by defendant's counsel to do so for the following reasons: the allegations that Amy had suicidal tendencies and was threatening to run away if returned to her parents; additionally, the court had not heard any testimony from Amy and being sixteen years and ten months old, she was fully capable of expressing her needs about her placement.

The court is primarily interested in the welfare of the minor involved. Accordingly, on its on initiative, the court requested that Amy confer with the court and said meeting transpired at 10:00 A.M. on today's date. A record of said meeting was made with Court Reporter Diane Bonilla and Deputy Clerk Erica Hanbury and Judge Martin F. Loughlin being present.

Without divulging at this time the conversation the court had with the minor, Amy, the court has drawn the following conclusions. First, and foremost, it would be deemed detrimental to the physical and emotional stability of the minor, Amy, to be returned to the plaintiffs as the court ordered on January 4, 1985.

As already stated in this order, this court has no jurisdiction as to custody of minors under any circumstances.

Accordingly, the court amends its order of January 4, 1985 by remanding the case to the Keene District Court for a hearing with due process being granted to the plaintiffs. While not an order of the court, it is suggested that judges other than Judges Talbot and Hampsey hear the case. This request in no way impugns the integrity of either judge. Said hearing should be held as expeditiously as

possible.

January 11, 1985

Martin F. Loughlin
U.S. District Judge

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Henry Malachowski, and
Julia Malachowski

v. Civil Action No. 84-697-L

City of Keene;
Mark J. Bennett, Esq.;
City of Keene Police Department;
Randall Lacoste, Patrolman;
H. Brown, Sergeant;
Judge Bernard J. Hampsey, Jr.;
Judge Richard J. Talbot;
David S. Park, Esq.;
Youth Services Inc. of the
Monadnock Region, a corporation;
Richard Archibald

J U D G M E N T

In accordance with the AMENDED ORDER OF JANUARY 4, 1985 dated January 11, 1985 by the Honorable Martin F. Loughlin, United States District Judge, the case is remanded to Keene District Court and judgment is hereby entered accordingly.

By the Court,

James R. Starr
Clerk

January 11, 1985

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Henry and Julia Malachowski

v. #C84-697-L

City of Keene, et al.

FURTHER ORDER OF THE COURT

The court on January 11, 1985 remanded the case to the Keene District Court for a hearing with due process being granted to the plaintiffs. Since that date the court has been deluged by pleadings from the plaintiffs with some responses from the defendants.

The court hereby makes the following order:

If a hearing is not granted by the Keene District Court on or before February 15, 1985, custody of the minor child, Amy, shall be restored to the plaintiffs.

All other pleadings are held in abeyance pending the hearing of February 15,

1985 or an appeal of this order by any of the parties.

February 5, 1985

Martin F. Loughlin
U.S. District Judge

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Henry and Julia Malachowski

v. #C84-697-L

City of Keene, et al.

ORDER ON MOTION FOR ORDER OF CONTEMPT

The plaintiffs filed this motion on March 8, 1985 the gist of which is to hold Judge Richard J. Talbot, Attorneys Mark J. Bennett and Attorney Paul Schweizer in contempt of this court's order. A hearing was requested. Said hearing is denied.

The motion to find the aforesaid defendants in contempt is denied as this court lacks jurisdiction.

Since the case was filed on November 1, 1984 to date with this order there are ninety-nine docket entries.

The court makes the following findings of fact which for the most part are uncontroverted.

As succinctly as possible, this court found lack of due process denied plaintiff (parents) (See order of January 4, 1985) because they were not notified of a hearing on August 4, 1984 and lost custody of their minor child (a female who will be 17 in April, 1985) and ordered that she be returned to plaintiffs. After an in camera hearing, the order of January 4, 1985 was modified. (Court met with minor daughter). Essentially, the court remanded the case to the Keene District Court with the precatory suggestion that Judges, other than Talbot and Hampsey hear the case. On the date of the hearing, counsel for the plaintiffs filed a recusal motion with Judge Talbot, but he chose to sit regardless. This court also found by uncontroverted evidence that the plaintiffs (parents) were denied record of proceedings that were not given to them(parents),

though requested, in violation of New Hampshire law. RSA 169-B:35. This was subsequently done with the Attorney General's Office acting as intermediary. Defendants state that this court is without jurisdiction and are right on this issue. The plaintiffs, especially Henry Malachowski is litigious, obdurate and recalcitrant, but he is still entitled to due process. This motion is in the nature or form of contempt.

As to the defendant Talbot the plaintiffs' allegations of alleged misconduct may be within the jurisdiction of the New Hampshire State Court.

The court also acts on the following motions:

On Defendant Park's motion for summary judgment, motion is granted. Attorneys fees may be granted subject to filing an itemized list of hours spent and costs

incurred.

On Defendant Park's motion to dismiss, motion granted see above order.

On Defendant Bennett's motion to strike and objection, see above order.

On motion for expeditious hearing, motion denied without prejudice to appealing the court's decision to the First Circuit Court of Appeals.

On motion for default judgment, motion denied.

On motion for order to rescind--retract, motion denied; see above opinion.

On motion for clarification, motion denied.

On motion for stay, motion denied.

On motion for order, Motion denied, see above opinion.

On order for clarification, motion denied.

March 26, 1985

Martin F. Loughlin
U.S. District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

HENRY MALACHOWSKI and/or JULIA MALACHOWSKI Plaintiff	)	Civil No. 84-697-L
VS	)	
CITY OF KEENE, et al Defendants	)	

NOTICE OF APPEAL

Notice is hereby given that Henry and/or Julia Malachowski, Plaintiff above named, hereby files an appeal to the United States Court of Appeals for the First Circuit from the Judgment entered, and on Motion for Expeditious hearing, denied without prejudice to appealing the court's decision to the First Circuit Court of Appeals. Dated March 26, 1985, Signed by U. S. District Judge Martin F. Loughlin, entered in this action.

Dated at Keene, New Hampshire, this day of March 27, 1985.

The Plaintiffs
HENRY MALACHOWSKI- Pro Se
Julia Malachowski- Pro Se

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

DATE: April 10, 1985

IN RE: 84-697-L, Malachowski v. City of Keene

The following orders were made on 4/10/85

( ) by Chief Judge Devine

(x) by Judge Loughlin

( ) by Magistrate Barry

( ) by Clerk Starr

On motion for stay pending appeal, motion denied.

On motion for reconsideration, motion denied. The parents were denied a record of certain proceedings until this court intervened with the aid of the New Hampshire Attorney General.

On motion to strike notice of appeal, motion denied; the 1st Circuit can deal with this controversy as it deemd expedient.

On motion to reconsider, the plaintiffs had two avenues of recourse which was quite obvious from the court's order. Their notice of appeal to the First Circuit Court of Appeals is granted and this court agrees that it should be expedited. Motion to reconsider is denied.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 85-1325

HENRY MALACHOWSKI AND
JULIA MALACHOWSKI,
Plaintiffs, Appellants,

v.

CITY OF KEENE, ET AL.,
Defendants, Appellees.

Before
Campbell, Chief Judge,
Bownes and Breyer, Circuit Judges.

MEMORANDUM AND ORDER

Entered May 14, 1985

We have reviewed the record in this case and dismiss this appeal as premature. See Rule 54(b) F.R.Civ.P.

While the proceedings below are subject to a number of interpretations, we regard the events as follows.

A suit was filed under 42 U.S.C.§ 1983 seeking both money damages and injunctive relief in a matter concerning the state taking custody of a child in the course of certain juvenile delinquency proceedings.

An injunction was entered on January 4, 1985 but was vacated on January 11, 1985. While the January 11 order was described as a remand to state court, we regard it

as a decision to abstain on the injunctive aspects of the case since, there having been no removal there could be no remand. A motion in the nature of a Rule 59(e) F.R.Civ.P. motion was timely filed on January 15, 1985, thus tolling any appeal period, but such decisions are normally not reviewable on an interlocutory basis in cases like this where other claims remain. Moses H. Cone Hospital v. Mercury Construction Co., 460 U.S. 1, 8-13 (1983).

A second injunction was entered on February 5, 1985 and the state court complied with it.

The money damage claims are in a somewhat cloudier posture. Some defendants have been dismissed. Some motions to join other defendants have been denied. What is clear is that some claims remain as to some parties and that some aspects of the prayer for injunctive relief have not been disposed of (i.e., barring future interference with custody), presumably as a matter of abstention.

Where some claims remain as to some parties, no final appealable judgment exists under Rule 54(b).[1]

Therefore we have no choice but to dismiss this appeal as presently outside our appellate jurisdiction.

In so determining, we do not wish to be understood as ruling by implication that the district court necessarily has subject matter jurisdiction over this case. That issue gives rise to important questions not yet decided below. Nor do we mean by

our characterization of certain orders, to limit at this time the district court's approaches to determining, as an initial matter, whether plaintiffs are to relief on any of the grounds set forth in their complaint.

By the Court:

Francis P. Scigliano
Clerk.

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1. Given the present posture of the case, judgment under Rule 54(b) would seem inappropriate.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

DATE: June 11, 1985

IN RE: 84-697-L, Malachowski v. Keene

The following order was made on 6/11/85

( ) by Chief Judge Devine

(x) by Judge Loughlin

( ) by Magistrate Barry

( ) by Clerk Starr

On motion to reconsider the following consolidated herein amended order of January 4, 1985--Order on pending motions to dismiss dated January 8, 1985, judgment entered on January 11, 1985, order on motion for order of contempt dated March 26, 1985--Reference is made to the Mandate and Memorandum and Order of the First Circuit Court of Appeals dated June 6, 1985.

This motion is denied and all of plaintiffs' actions not heretofore disposed of are dismissed because this court finds that it does not have jurisdiction.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

DATE: 6/25/85

IN RE: 84-697-L, Malachowski v. Keene, et al.

The following order was made on 6/25/85

( ) by Chief Judge Devine

(x) by Judge Loughlin

( ) by Magistrate Barry

( ) by Clerk Starr

On motion for stay, motion denied without prejudice to the petitioner appealing this court's ruling.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

HENRY MALACHOWSKI and/or JULIA MALACHOWSKI Plaintiff	)	Civil No. 84-697-L
VS	)	
CITY OF KEENE, et al Defendants	)	

NOTICE OF APPEAL

Notice is hereby given that Henry and/or Julia Malachowski, Plaintiff above named, hereby files an appeal to the United States Court of Appeals for the First Circuit from the Order entered on June 11, 1985 on motion to reconsider the following consolidated herein amended order of January 4, 1985--Order on pending motions to dismiss dated January 8, 1985, judgment entered on January 11, 1985, order on motion for order of contempt dated March 6, 1985--Reference is made to the Mandate and Memorandum and Order of the First Circuit Court of Appeals dated June 6, 1985. This

motion is denied and all plaintiffs' action not heretofore disposed of are dismissed because this court finds that it does not have jurisdiction. By Judge Loughlin. Judgment entered on June 12, 1985--In Accordance with the Amended Order of January 4, 1985 and the denial of Plaintiffs' Motion to Reconsider dated June 11,[1] 1985 dismissing all actions not heretofore disposed of,. by the Honorable Martin F.. Loughlin,. United States District Judge,. Judgment is hereby entered,. By the Court, James R. Starr,. Clerk.

. Notice is hereby given that the Court (Honorable Martin F. Loughlin) disregarded the Memorandum and Order entered on May 14, 1985 by the First Circuit Court of Appeals in re appeal No. 85-1325. The Court (Honorable Martin F. Loughlin) refused to com-

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[1] Federal Court Clerk's error, should read May 28.

ply with other Federal, U. S. Appeals Court and U. S. Supreme Court decisions upon the same essential matters as cited above in appellants' Motion to Reconsider, dated May 28, 1985, where state statutes were unconstitutionally applied terminating parents' rights and interests protected by the Due Process Clause of the Fourteenth Amendment of the Federal Constitution,. thereby refused to protect the appellants' federal constitutional rights thus denying the appellants' their entitlement to have the federal court find those facts necessary for a decision on their constitutional claims.

The Court, again remanded appellants' federal court jurisdiction over appellants' Civil Rights action to state court in defiance of the First Circuit Appeals Court decision of May 14, 1985.

In furtherance of appellants' appeal,.

the First Circuit Court of Appeals' Memorandum and Order entered on May 14, 1985 states: "A second injunction was entered on February 5, 1985 and the state court complied with it." Appellants say: the necessary party "Amy" was not present to confer jurisdiction upon the court, there was and could be no rebuttal and/or confrontation as required under the Due Process Clause of the Fourteenth Amendment. There were no specific charges, allegation, complaint or otherwise filed by the state, the appellants' (parents') physical and legal relationship of their daughter Amy was terminated in the absence of a compelling state interest, the appellants' Due Process rights were violated. The judge who presided is named as a defendant in appellants' federal Civil Rights action, should have recused himself on December 27, 1984 and on February 13, 1985.

In furtherance of appellants' appeal, the state defendant Judges' Motion for Stay #50, dated and filed on January 8, 1985 was granted exparte on January 9, 1985, reversed the Order of January 4, 1985, was done without giving the appellants prior notice and/or opportunity to object. The Court (Honorable Martin F. Loughlin) contacted the state's attorney, gave the state attorney preferential treatment, which did immediately deprive the appellants their entitlement to federal court's jurisdiction over the subject matter. The Court did thereby enter an amended Order dated January 11, 1985 remanding appellants' federal jurisdictional rights and constitutional claims to a state court.

Appellants' Motion for Temporary or Permanent Restraining Order dated November 13 1984, to regain custody of their daughter unconstitutionally seized, was buried in

the file and was not acted upon until January 4, 1985 Order, which was not sent to the state court.

Appellants' Motion for Stay dated June 13, 1985 of Court's Order of June 11, 1985 above, was hand delivered on June 13, 1985 for immediate decision on grounds that the Court was in serious error by depriving the appellants of their rights to federal court, citing therein federal, U.S. Appeals Court and U.S. Supreme Court authorities of the same federal matters, was also not acted upon and kept in the file. Clerk's response, was that the defendants have ten (10) days under Local Rules to reply. Appellants say; the State defendant Judges' Motion for Stay was granted the next day without prior notice to the appellants or the opportunity to object by the Court (Honorable Martin F. Loughlin) who disregarded Local and Federal Rules

and federal court's jurisdiction over the subject matter.

The appellants sought federal court protection of their rights and interests protected by the Due Process Clause of the Fourteenth Amendment, instead were further deprived of their rights under the Fourth, Fifth, Sixth, Seventh and Fourteenth Amendments and the parents' entitlement to federal court for a decision on their constitutional claims, were all denied by the Honorable Martin F. Loughlin.

The appellants, as responsible parents, have done that which other parents have done through federal court and otherwise to regain custody of their children, who were unconstitutionally seized. The Court (Martin F. Loughlin) says in his Order on Motion for Order of Contempt, dated March 26, 1985, page 2, "The plaintiffs, especially Henry Malachowski is litigious,

obdurate and recalcitrant, but is still entitled to due process." The Court never heard the parents' plight, the time consuming efforts, day and night, to bring up their daughter Amy, in these times where outside influences, the school, peer group and others attempt to predominate this young immature child, who is not alone and was swayed. Parents' duty is to give the child a chance for the better life. The State of New Hampshire, by its employees, have unconstitutionally and criminally interferred and hindered the parents' constitutional rights, protected by the Fourteenth Amendment, to bring up Amy in a way acceptable to their own judgment.

WHEREFORE:

The appellants hereby gives notice to appeal the above, Court's Order of June 11 1985 and Judgment entered on June 12, 1985 and pray for reversal.

The Plaintiffs-Appellants

Dated June 19, 1985 at Keene, New Hampshire

Henry Malachowski - Pro Se

Julia Malachowski - Pro Se
28 Wright Street
Keene, New Hampshire 03431
352-5822

CERTIFICATION

I/we certify that a copy of the foregoing, Notice of Appeal, was mailed on June 19, 1985, to Loretta S. Platt, Assist. Att. General; Michael B. O'Shaughnessy, Esq.; Donald R. Gardner, Esq.; David S. Park, Esq.

Henry Malachowski - Pro Se

Julia Malachowski - Pro Se

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 85-1583

HENRY MALACHOWSKI AND
JULIA MALACHOWSKI,

Plaintiffs, Appellants,

v.

CITY OF KEENE, ET AL.,

Defendants, Appellees.

APPEAL FROM THE U. S. DISTRICT COURT

FOR THE DISTRICT OF NEW HAMPSHIRE

(Hon. Martin F. Loughlin, U.S.D.J.)

Before

Campbell, Chief Judge,

Bownes and Breyer, Circuit Judges.

March 28, 1986

Per Curiam. This is an appeal brought by plaintiffs-appellants Henry and Julia Malachowski, proceeding pro se, from orders of the United States District Court for the District of New Hampshire dismissing appellants' claims under 42 U.S.C. 1983 for injunctive relief and damages against ten defendants-appellees. Appellants' complaint alleged that their federal constitutional rights had been violated in the course of juvenile delinquency proceedings in the Keene, New Hampshire District Court against their daughter, Amy, which resulted in Amy's release into foster care outside appellants' custody. We affirm the district court's dismissal.

I. FACTUAL BACKGROUND.

Amy initially was placed in foster care on January 24, 1984, pursuant to a consent order entered as a result of a petition alleging abuse and/or neglect of Amy filed

in Keene District Court by the New Hampshire Division of Welfare. Amy was returned to appellants' custody on April 12, 1984. On August 3, 1984, Mrs. Malachowski called the Keene police to report that Amy, then sixteen years old, had run away. Mr. Malachowski located her at a friend's house and brought her home. When Patrolman LaCoste arrived at the Malachowski residence in response to Mrs. Malachowski's call, he knocked on the door and Mrs. Malachowski opened it. Through the open door he saw and heard -- taking the facts as alleged by appellants -- Amy throwing a "tantrum" and directing abusive language at Mr. Malachowski (appellants deny that Amy struck him). LaCoste then entered the house, allegedly without appellants' permission, and took Amy into custody.

The Keene police then contacted Judge Bernard Hampsey and obtained authorization

to hold Amy overnight pending arraignment. The next morning, August 4, Amy was arraigned in Keene District Court on a juvenile delinquency petition, signed by Sergeant Brown, juvenile officer in the Keene Police Department, alleging disorderly conduct and that Amy struck Mr. Malachowski. Appellants were not present at the arraignment and allegedly were notified of it only by a phone call from Sergeant Brown ten minutes before it began. At the arraignment attorney David Park, who had been Amy's guardian ad litem in the earlier abuse and neglect proceeding, was appointed to represent her. Amy allegedly told him she did not want to return to her parents, and he agreed to a court order that she be temporarily detained in the Youth Development Center pending an adjudicatory hearing, held on September 11, 1984, with appellants present and Judge

Richard J. Talbot presiding, Amy pleaded "chargeable" to the juvenile delinquency petition. The court ordered her temporarily placed in foster care with Youth Services, Inc. ("Y.S.I.") pending the dispositional hearing. At the dispositional hearing, held on October 11, 1984, with appellants present, the court ordered that Amy remain in the custody of Y.S.I., ordered family counselling, and scheduled a review for December 27, 1984.

Neither Amy nor appellants on her behalf filed an appeal from this dispositional order pursuant to N.H.R.S.A. 169-B:29. Nor did appellants petition the New Hampshire Supreme Court for a writ of certiorari to challenge it. See N.H.R.S.A. 490:4. Instead, on November 1, 1984, appellants brought the instant federal court action under § 1983, not on behalf of Amy but seeking redress for alleged violations of

their own constitutional rights. Named as defendants -- and appearing as appellees herein -- were New Hampshire District Court Judges Hampsey and Talbot, Y.S.I. and its employee Richard Archibald, attorney David Park, the City of Keene and its Police Department, the city's prosecuting attorney Mark Bennett, Sergeant Brown, and Patrolman LaCoste.

In addition to various allegations directed at particular defendants, each of which we will discuss in turn below, appellants also attacked the legality of the Keene District Court proceedings themselves. Their primary allegations, insofar as they can be discerned from appellants' murky complaint, are that they were not given adequate notice of Amy's arraignment; they were not given notice until October 4, 1984, of the contents of the delinquency petition filed against Amy, in

violation of N.H.R.S.A. 169-B:7 and In re Gault, 387 U.S. 1 (1967); they were deprived of, and not given adequate notice of, their right to retain counsel for Amy; they were not given a copy of Y.S.I. recommendations concerning Amy's custody before or during the dispositional hearing; they were not permitted access to the court records pertaining to Amy's case, in violation of N.H.R.S.A. 169-B:35; Amy was removed from their custody even though she was never actually adjudicated a delinquent, but pleaded "chargeable"; a finding of delinquency for use of foul language violated the First Amendment; and appellees acted with malicious intent pursuant to a conspiracy to manipulate the Keene District Court proceedings to deprive appellants of Amy's custody. The complaint sought compensatory and punitive damages against all defendants and also requested

injunctive relief restoring Amy to appellants' custody, ordering that all juvenile delinquency charges against Amy be dropped, and barring any further attempts to interfere with appellants' custody.

Appellant Henry Malachowski then also filed on November 30, 1984, a petition for a writ of habeas corpus in the New Hampshire Supreme Court seeking to regain custody of Amy. The Supreme Court dismissed the petition without prejudice to appellant refiling it in the superior court, which apparently he has not done. A Keene District Court hearing to review Amy's disposition was held on December 27, 1984, with appellants present, but the court had not rendered a decision prior to the intervention of the district court below in the instant action.

On January 4, 1985, the district court (Loughlin, J.), following a January 2 hear-

ing on pending motions, issued an order that Amy be restored to appellants' custody. Appellees Judges Hampsey and Talbot moved for a stay of this order, asking that Amy first be consulted. The district court granted the stay and, on January 8, granted appellees Judges Hampsey and Talbot's motion to dismiss all damage claims on grounds of judicial immunity; denied their motion as to appellants' claims for injunctive relief; granted appellee Y.S.I.'s motion to dismiss for lack of state action; and dismissed appellee Richard Archibald for lack of service. On January 10, the district court interviewed Amy in chambers and, after finding that it would be detrimental to her well-being to be returned to appellants' custody, ruled on January 11 that it lacked subject matter jurisdiction and "remanded" the case to the Keene District court. Judgment was

entered.

Subsequently, following numerous additional filings by appellants, the district court on February 5 further ordered that custody of Amy would be restored to appellants unless the Keene District Court held a hearing on or before February 15. That hearing was held on February 13, with appellants present, and resulted in an order by Judge Talbot continuing custody with Y.S.I. until June 30, 1985, with appellants to regain custody at that time unless Amy first requested a hearing. On March 26, 1985, the district court granted appellee Park's motion to dismiss and motion for summary judgment. Appellants then filed a notice of appeal in this court, which was dismissed as premature on May 14, 1985, because the case had not been finally resolved as to all parties. The district court then ruled on June 11

that "(a)ll of plaintiffs' actions not heretofore disposed of are dismissed because this court finds it does not have jurisdiction." Appellants appealed. Appellants then also filed, on June 26, 1985, an appeal in the Cheshire County, New Hampshire Superior Court, which was dismissed as untimely.

II. APPELLANTS' CLAIMS FOR INJUNCTIVE RELIEF.

Appellants' complaint prayed for the following injunctive relief: a permanent injunction restoring Amy to appellants' custody; withdrawal of the juvenile delinquency charges against Amy; and a permanent injunction barring appellees from future interference with appellants' custody of Amy. We interpret the district court's January 11 dismissal of these claims for lack of jurisdiction as a decision to abstain on the injunctive as-

pects of the case. We affirm.

As an initial matter, it appears that, so far as can be discerned from appellants' complaint, most, if not all, of appellants' objections to the Keene District Court proceedings involve alleged violations of the New Hampshire law. These alleged faults in the state proceedings do not rise to the level of federal constitutional violations, actionable under § 1983. Mere alleged misuse or disregard of state law by state officials does not constitute a deprivation of property without constitutional due process of law. See Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984); Friends of Children, Inc. v. Matava, 766 F.2d 35 (1st Cir. 1985). Such deficiencies, if they exist, are readily and adequately correctable under state law in state court. We add that, insofar as the injunctive relief

sought by appellants -- ordering return of custody to appellants and withdrawal of the petition against Amy -- would be tantamount to reversal of the Keene District Court's orders, "(t)he federal courts do not review state court civil proceedings under the guise of the Civil Rights Act." Fortune v. Mulherrin, 533 F.2d 21, 22 (1st Cir.), cert. denied, 429 U.S. 864 (1976).

As to any of appellants' objections to the state court proceedings not disposed of by the foregoing principles, we agree with the district court that abstention was appropriate. The Supreme Court has held, in Younger v. Harris, 401 U.S. 37 (1971), that considerations of federalism and comity demand that a federal court should abstain from asserting jurisdiction, at least as to claims for injunctive or declaratory relief, over a matter that is the subject of pending state criminal pro-

ceedings. Federal court intervention can be countenanced only where a plaintiff can show there is no opportunity to raise the federal issues in a state court, a state statute under attack is "flagrantly and patently violative of express constitutional prohibitions in every clause," id. at 53-54, or a plaintiff can show "bad faith, harassment, or any other unusual circumstance that would call for equitable relief." Id. at 54.

There is no question that Younger principles apply to the instant action. The Supreme Court has expanded the applicability of Younger to many categories of civil proceedings, including a state child custody action. Moore v. Sims, 442 U.S. 415 (1979). Whether the Keene District Court juvenile delinquency proceedings are characterized as quasi-criminal or as child custody proceedings, therefore, the pro-

priety of federal interference with them must be judged by Younger standards. Insofar as appellants seek an order returning Amy to their custody, "the fact that 'family law' is at issue here makes 'abstention' particularly appropriate." Friends of Children, Inc., supra, 766 F.2d at 37.

Applying those standards, we find that the district court's abstention from asserting jurisdiction over appellants' injunctive claims was fully justified. Appellants filed the instant complaint in federal court on November 1, 1984, before the end of the 30-day period specified in N.H.R.S.A. 169-B:29 during which Amy, or perhaps appellants on Amy's behalf, could have appealed the October 11 dispositional order to the New Hampshire Superior Court. Even if appellants could not bring a direct appeal on their own behalf under that

statute, they had open to them the option, with no express time limitation, of seeking a writ of certiorari from the N.H. Supreme Court to review the Keene District Court proceedings. N.H.R.S.A. 490:4. See In re John M. and David C., 122 N.H. 1120, 1130, 454 A.2d 887 (1982). Under these circumstances, see Huffman v. Pursue, Ltd. 420 U.S. 592, 607-611 (1975), Younger policies counsel abstention.

Furthermore, although N.H.R.S.A. 169-B:29 fixed the state district court's dispositional order as the only proper occasion for the minor's appeal as of right to the superior court for a de novo hearing -- reflecting a legislative policy judgment that a right to de novo review at any other point in juvenile delinquency proceedings is unnecessary, see In re Cindy G., 124 N.H. 51, 58, 466 A.2d 943 (1983) - the district court juvenile delinquency

proceedings were not finally concluded at that time. Instead, the district court retains jurisdiction and must review its disposition at least once annually. N.H. R.S.A. 169-B:31; In re Cindy G., supra, 124 N.H. at 57-58. In the instant case the record reveals that the Keene District Court has reviewed Amy's disposition on at least two occasions following its initial dispositional order, on December 27, 1984, and on February 13, 1985. Appellants' filings herein indicate that appellants have presented further requests for a return of Amy's custody, or for other relief, to the Keene District Court on numerous occasions. At the time the district court dismissed appellants' injunctive claims, therefore, the Keene District Court still remained available as a local forum where appellants could press objections to Amy's custody.

Appellants have said nothing to suggest that this case falls within any of the exceptions recognized by Younger, exceptions which have been narrowly construed. See United Books, Inc. v. Conte, 739 F.2d 30, 34 (1st Cir. 1984). There is, and can be, no allegation that the New Hampshire juvenile delinquency statute is flagrantly unconstitutional on its face. While appellants assert that they have been victims of a conspiracy in the state proceedings, they have pleaded no facts adequate to support that assertion. Nor does their loss of Amy's custody, which might prove temporary, constitute the sort of serious, imminent, and irreparable harm that conceivably might warrant extraordinary federal court intervention. We cannot doubt, therefore, that dismissal of appellants' claims for injunctive relief on Younger grounds was well within the district

court's discretion. See Friends of Children, Inc., supra, 766 F.2d at 37; Allstate Insurance Co. v. Sabbagh, 603 F.2d 228, 230 (1st Cir. 1979).

Even apart from Younger, it is well-settled that, since the field of domestic relations involves local problems peculiarly suited to state regulation and control, a suit whose substance involves domestic relations cannot ordinarily be maintained in a federal court. Friends of Children, Inc. supra, 766 F.2d 35; Sutter v. Pitts, 639 F.2d 842 (1st Cir. 1981); Donnelly v. Donnelly, 515 F.2d 129 (1st Cir.), cert. denied, 423 U.S. 998 (1975); Armstrong v. Armstrong, 508 F.2d 348 (1st Cir. 1974). Even assuming, arguendo, that a state juvenile delinquency proceeding, being a quasi-criminal action, does not fall strictly within the confines of this exception, courts have also recognized the broader

principle that "a federal court may still decline jurisdiction if the action is 'on the verge' of the exception." Bossom v. Bossom, 551 F.2d 474, 475 (2d Cir. 1976); Phillips, Nizer, Benjamin, Krim & Ballon v Rosenstiel, 490 F.2d 509, 516 (2d Cir. 1973). In the instant case, the injunctive aspects of appellants' complaint, while "clothed...in the garb of a civil rights action,...boil...down to a demand for custody of the child." Sutter, supra, 639 F.2d at 844. We could hardly conclude, therefore, that the district court abused its discretion in its decision to abstain on the injunctive aspects of appellants' complaint in order to avoid federal court interference in an area of predominant state concern.

As to certain appellees, i.e., David Park and Y.S.I., appellants' claims for injunctive relief also were subject to

dismissal, along with appellants' damages claims, for lack of the requisite state action. See section III (B), infra. We turn now to our review of the district court's dismissal of the damages claims.[1]

III. APPELLANTS' CLAIMS FOR DAMAGES.

Unlike appellants' claims for injunctive relief, which were properly dismissed as to all appellees either for failure to state a § 1983 claim or by application of principles of abstention, appellants' claims for damages generally present discrete issues as to different appellees. Accordingly, we will discuss each in turn. Although for reasons already discussed in section II, pp. 7-8, supra, appellants may have failed to state a § 1983 damages claim against certain appellees, dismissal was appropriate as to each appellee for addit-

1. Appellants' claims for criminal sanctions under 18 U.S.C.§§ 241, 242 were properly dismissed in this civil action.

ional reasons.

A. Judges Hampsey and Talbot.

The Supreme Court has established that a judge enjoys absolute immunity from damages claims arising out of actions taken in his judicial capacity unless "he has acted in the clear absence of all jurisdiction." Stump v. Sparkman, 435 U.S. 349 357 (1978). The New Hampshire juvenile delinquency statute unequivocally grants appellees Judges Hampsey and Talbot, as New Hampshire District Court judges, jurisdiction over juvenile delinquency proceedings, N.H.R.S.A. 169-B:3, and jurisdiction to order juveniles to foster care. N.H.R.S.A. 169-B:14, 19. Appellants' claims for damages against Judges Hampsey and Talbot, accordingly, were properly dismissed.

B. David Park, Y.S.I., and Richard Archibald.

Appellants' claims against appellees David Park, Y.S.I., and Y.S.I. employee Richard Archibald essentially boil down to the allegations that they made defamatory statements against appellants and joined in a conspiracy with other appellees to wrest Amy from appellants' custody without cause or justification. Archibald was properly dismissed from the case after appellants failed to serve him. The district court granted Park's motion to dismiss and motion for summary judgment and Y.S.I.'s motion to dismiss, finding that appellants' complaint did not allege sufficient facts to suggest they acted "under color of state law" for purposes of § 1983. We agree.

It is black-letter law that a showing of interference with a constitutionally-protected right by someone acting under color of state law is prerequisite to a §

1983 action. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); Monroe v. Pape, 365 U.S. 167 (1961). Appellee Park, a private attorney, is sued for actions allegedly taken as court-appointed counsel for Amy in the Keene District Court proceedings. A private attorney who is sued for actions allegedly taken as court-appointed counsel does not act under color of state law. Polk County v. Dodson, 454 U.S. 312 (1981); Page v. Sharpe, 487 F.2d 567, 570 (1st Cir 1973).

The Supreme Court in Blum v. Yaretsky, 457 U.S. 991 (1982), identified three factors guiding the determination whether an ostensibly private entity's conduct constitutes "state action" for purposes of § 1983:

> "'(T)here is a sufficiently close nexas between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the

State itself.'

....

(The state) "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.

....

"(T)he private entity has exercised powers that are 'traditionally the exclusive prerogative of the State.'"

Id. at 1004-05. Accepting all allegations of appellants' complaint, Y.S.I., a private, non-profit organization, made available foster homes for state agencies and provided recommendations to the juvenile court with respect to child placement. At no time did Y.S.I. assume the state's mantle of authority; decisions regarding Amy's disposition were the sole province of the Keene District Court. Appellants have not alleged that Y.S.I. was regulated or funded by, or under contract with, the state of New Hampshire. Also, child care and placement is not traditionally the exclu-

sive prerogative of the state. Player v. State of Alabama Department of Pensions and Security, 400 F.Supp. 249, 262 (M.D. Ala. 1975), aff'd, 536 F.2d 1385 (5th Cir. 1976). See also Kelley v. Action for Boston Community Development, 419 F.Supp. 511 516-18 (D.Mass. 1976).

Appellants do allege that appellees Park and Y.S.I. acted in concert with state officials to deprive appellants of constitutional rights, a factor which would satisfy the "color of state law" requirement. McGillicuddy v. Clements, 746 F.2d 76 (1st Cir. 1984). However, appellants' allegations are bald and conclusory, and do not include sufficient factual detail to defeat a motion to dismiss. "(S)ome factual basis supporting the existence of a conspiracy must be pled when a conspiracy is alleged in a civil rights case." Id. at 77 (quoting Glaros v. Perse

628 F.2d 679, 685 (1st Cir. 1980)).

C. Mark Bennett.

Appellants contend that appellee Mark Bennett, city attorney for the City of Keene, intruded upon their constitutional rights in the course of his participation as prosecutor in the Keene District Court proceedings. In his capacity as prosecutor, however, he is absolutely immune from a suit for damages under § 1983. Imbler v Pachtman, 424 U.S. 409 (1976); Morrison v. Jones, 607 F.2d 1269, 1273 (9th Cir. 1979), cert. denied, 445 U.S. 962 (1980) (prosecutor in juvenile court proceedings enjoys absolute immunity). While proper allegations of conspiracy could overcome the immunity, see San Filippo v. U.S. Trust Co. of New York, 737 F.2d 246, 256 (2d Cir. 1984), appellants' allegations, again, are wanting.

D. City of Keene and City of Keene

Police Department.

A local governing body, such as a municipality or its police department, cannot be held liable in damages under § 1983 merely because it employs a tortfeasor. Rather, a local governing body can be sued directly under § 1983 only where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulations or decision officially adopted and promulgated by that body's officers...(or was taken) pursuant to governmental custom even though such a custom has not received formal approval through the body's official decision-making channels." Monell v. Department of Social Services, 436 U.S. 658 (1978). See City of Oklahoma City v. Tuttle, 105 S.Ct. 2427 (1985); Voutour v. Vitale, 761 F.2d 812 (1st Cir. 1985). Since appellants have alleged no such city policy, practice,

or custom, their claims against the City of Keene and its Police Department were properly dismissed.

E. Sergeant Brown.

Appellants' claims against appellee Sergeant Brown are as follows: (1) that Brown informed appellants only at 8:50 a.m. on August 4, 1984, the day after Amy's arrest, that Amy's arraignment would occur at 9 a.m., (2) that Brown falsely described the effects of Amy's arraignment to appellants; and that Brown maliciously signed the juvenile delinquency petition against Amy with the knowledge that it was false (in that it charged Amy with striking Mr. Malachowski, which appellants deny).

The first two allegations do not rise to the level of federal constitutional violations. As to the first, while due process requires that parents receive ade-

quate notice of the adjudicatory hearing, In re Gault, 387 U.S. 1 (1967), it does not require immediate notice to parents, within twenty-four hours, of the filing of a delinquency petition. See Holloway v Wainwright, 451 F.2d 149 (5th Cir. 1971); City of Claremont v. Truell, 489 A.2d 581, 587 (N.H. 1985). In any case, under N.H. R.S.A. 169-B:7 it is the responsibility of the Keene District Court, not Sergeant Brown, to notify a minor's parents that a delinquency petition has been filed. As to the second, it does not appear that Brown's alleged summary of the potential consequences of Amy's arraignment was false. According to appellants' complaint, Brown told appellants that Amy would have no record and could be detained for only 21 days as a result of the arraignment. This is an accurate account of what the state juvenile delinquency statute pro-

vides. N.H.R.S.A. 169-B:13-14, 35.

Finally, Sergeant Brown enjoys absolute immunity from damages liability under § 1983 for his filing an allegedly false delinquency petition against Amy. The Supreme Court has held that a police officer who testifies as a witness at a criminal trial enjoys absolute immunity from § 1983 damages liability for his testimony, based in part on his status "as an official performing a critical role in the judicial process." Briscoe v. LaHue, 460 U.S. 325, 336 (1983). Under Imbler v. Pachtman, 424 U.S. 409, 431 (1976), a prosecutor is immune from a civil suit for damages under § 1983 "in initiating a prosecution and in presenting the State's case." The Court also has accorded absolute immunity to agency officials performing functions analogous to those of a prosecutor in Butz v. Economou, 438 U.S.

478, 515 (1978), which held that executive officials are immune from damages under § 1983 "with respect to the initiation of administrative proceedings." Under these authorities, Sergeant Brown's initiation of juvenile delinquency proceedings in his capacity as a juvenile officer of the Keene Police Department cannot form the basis of § 1983 damages liability. Sergeant Brown's filing of the petition against Amy was not an "investigative" activity, but rather an activity "intimately associated with the judicial phase of the criminal process...to which the reasons for absolute immunity apply with full force." Imbler, supra, 424 U.S. at 430.

Several courts have applied the above principles to state proceedings concerned with the protection and welfare of juveniles. The Sixth Circuit, in Kurzawa v.

Mueller, 732 F.2d 1456, 1458 (6th Cir. 1984), held that "state employees who are responsible for the prosecution of child neglect and delinquency petitions,"including social services workers who played various roles in removing a child from his home into foster care, the child's guardian ad litem, and state psychologists whose findings were used by the juvenile court, enjoy absolute immunity under § 1983. The court reasoned that state officials with responsibility "to protect the health and well-being of the children of Michigan... must be able to perform the necessary tasks to achieve this goal without the worry of intimidation and harassment from dissatisfied parents." Id. In Walden v. Wishengrad, 745 F.2d 149 (2d Cir. 1984), the Second Circuit held that a Department of Social Services attorney who initiates and prosecutes child protective orders en-

joyed absolute immunity from damages claims arising out of the performance of her duties. Finally, the Eight Circuit in Martin v. Aubuchon, 623 F.2d 1282, 1285 (8th Cir. 1980). accorded immunity to the initiation of juvenile dependency and neglect proceedings by a county district attorney. See also Pepper v. Alexander, 599 F.Supp. 523, 526-27 (D.N.Mex. 1984); Whelehan v. County of Monroe, 558 F.Supp. 1093 (W.D.N.Y. 1983). We agree that a juvenile officer, such as Sergeant Brown, must be free from the threat of harassment and intimidation in his decision to initiate juvenile delinquency proceedings.

Although Sergeant Brown's immunity may not extend to allegations that he filed a false delinquency petition as part of an overarching conspiracy with other appellees to deprive appellants of Amy's custody, appellants have not pleaded one shred

of evidence in support of their conclusory allegations of conspiracy. See Slotnick v Garfinkle, 632 F.2d 163, 165-66 (1st Cir. 1980).

Furthermore, even if Sergeant Brown did not enjoy absolute immunity, cf. Malley v. Briggs, 54 U.S.L.W. 4243 (S.Ct. March 4, 1986) (police officer does not enjoy absolute immunity in submitting complaint and affidavit to procure an arrest warrant), appellants' allegation that Brown maliciously filed a false delinquency petition fails to state a claim under § 1983. It is well-settled that a § 1983 claim for deprivation of civil rights through malicious prosecution cannot be stated without an allegation that the prosecution terminated in a manner favorable to the accused. Singleton v. City of New York, 632 F.2d 185, 195 (2d Cir. 1980), cert. denied, 450 U.S. 920 (1981); Tucker v. Duncan, 499 F.

2d 963 (4th Cir. 1974); Sullivan v. Choquette, 420 F.2d 674 (1st Cir. 1969), cert. denied, 398 U.S. 904 (1970). Since Amy pleaded "chargeable" and was adjudicated a delinquent on that basis, appellants' 1983 claim cannot proceed. Accordingly, the district court's dismissal of appellants' claim against Brown was correct on this alternative ground.

F. Patrolman LaCoste.

Appellants' claim against appellee La Coste is that on August 3, 1984, he entered their residence without a warrant and without their consent in order to take Amy into custody. As alleged by appellants in their complaint, and as further explained by appellants in a January 2, 1985, hearing in the district court, Mrs. Malachowski telephoned the Keene Police Department on August 3 to report that Amy had run away. When LaCoste arrived at the Mala-

chowski residence in response to this call. Amy was already inside, Mr. Malachowski having located her and brought her home. LaCoste knocked on the kitchen door and was told by Mrs. Malachowski that Amy was inside. While at the open door he saw and heard Amy--apparently reacting to the sight of a policeman--erupt into a "tantrum" and direct foul and abusive language at Mr. Malachowski (appellants deny that Amy struck Mr. Malachowski). LaCoste thereupon entered the home and took Amy into custody.

Appellants, again, did not bring the instant action on Amy's behalf or for her benefit; they seek vindication for alleged deprivations of their own constitutional rights. We do not have before us, therefore, any claim that the manner of Amy's arrest violated Amy's rights under the Fourth Amendment--a matter appellants

could not raise--but rather a claim that LaCoste's warrantless, nonconsenual entry into appellants' residence in order to effect the arrest violated appellants' Fourth Amendment rights. The district court dismissed appellants' claim against LaCoste for lack of jurisdiction. We affirm on the ground that, in light of LaCoste's qualified immunity from damages liability under § 1983, appellants failed to state a § 1983 claim against LaCoste. See Helvering v. Gowran, 302 U.S. 238, 245 (1937) (court of appeals can affirm on any ground presented by the record).

Even if appellants' complaint arguably could be said to allege conduct by LaCoste violative of the Fourth Amendment, cf. Welsh v. Wisconsin, 466 U.S. 740 (1984), we agree that dismissal of appellants' claims against LaCoste was proper. On the face of appellants' allegations, LaCoste

acted in good faith as a matter of law and, consequently, is immune from liability. It is well-settled that a police officer acting within the scope of his proper functions enjoys qualified immunity from 1983 damages liability, so that he may not be held liable for good-faith conduct. Pierson v. Ray, 386 U.S. 547, 557 (1967). In Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), the Supreme Court made it clear that the determination of a government official's good faith is a matter of objective inquiry, so that officials "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Under these principles a police officer is "excus(ed) from liability for acting under a statute that he reasonably believed to be

valid but that was later held unconstitutional, on its face or as applied." Gomez v. Toledo, 446 U.S. 635, 639 (1980); Pierson, supra, 386 U.S. at 555. This objective good-faith test permits resolution of questions of qualified immunity as a matter of law in appropriate cases. Floyd v. Farrell, 765 F.2d 1, 6 (1st Cir. 1985).

In the instant case, LaCoste acted well within the scope of the powers expressly granted him under applicable New Hampshire statutes. LaCoste had adequate reason to believe that Amy's use of loud, abusive language, in the circumstances alleged by appellants, constituted disorderly conduct under N.H.R.S.A. 644:2 (III)(a) (a person is guilty of disorderly conduct if "he... makes loud or unreasonable noises in a private place which can be heard in a public place or other private places, which noises would disturb a person of average

sensibilities"). Given that Amy pleaded guilty and was adjudicated a delinquent on a charge of disorderly conduct, we are not disposed to find that LaCoste lacked probable cause to arrest her on that charge. In any case, LaCoste also had authority to take Amy into custody pursuant to N.H. R.S.A. 169-B:9, which provides that a police officer may immediately take into custody "any minor...whose circumstances are such as to endanger his person or welfare, unless immediate action is taken." LaCoste unquestionably had adequate grounds to form a reasonable belief that Amy's welfare was endangered, given that Amy previously had been removed temporarily from appellants' custody following abuse and/or neglect proceedings, Amy allegedly had run away from home that same night, and Amy was in the midst of a "tantrum," directing foul language at Mr.

Malachowski. Accordingly, we could not find that LaCoste lacked probable cause to take Amy into custody.

Although LaCoste entered appellants' residence without a warrant and without consent in order to make the arrest, N.H. R.S.A. 594:10(I)(a) expressly permits a police officer to make an arrest for an offense committed in his presence, as LaCoste did here. This statute states, "An arrest by a peace officer without a warrant on a charge of a misdemeanor or a violation is lawful whenever: (a) he has probable cause to believe that the person to be arrested has committed a misdemeanor or violation in his presence." As a matter of law, therefore, LaCoste acted in objective good faith, according to New Hampshire statutes, when he entered appellants' residence to take Amy into custody.

Even if we were to discern a constitu-

tional infirmity in LaCoste's application of these state statutes to effect a warrentless home arrest, certainly LaCoste could not reasonably be expected to anticipate such a difficulty. There can be no claim that these statutory provisions obviously are illegitimate on their face. LaCoste was entitled to act in accordance with governing state statutory law. Since he conformed his conduct to that law, LaCoste is immune from damages liability under § 1983.

The judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 85-1583

HENRY MALACHOWSKI AND
JULIA MALACHOWSKI,
Plaintiffs, Appellants,

v.

CITY OF KEENE, ET AL.,
Defendants, Appellees.

Before
Campbell, Chief Judge,
Bownes and Breyer, Circuit Judges.

ORDER OF COURT

Entered April 8, 1986

Appellants' Motion for Decision Upon Appellants' Reply Brief--treated as a petition for rehearing--is denied. In reaching its decision this court considered appellants' reply brief and appellants' other submissions.

By the Court:

Francis P. Scigliano
Clerk

E X H I B I T S

THE STATE OF NEW HAMPSHIRE
JUVENILE PETITION

Cheshire SS. Keene District Court
84-210 Juvenile Case No.

TO THE JUSTICE OF SAID DISTRICT COURT:

The undersigned represents that Amy Christine Malachowski of 28 Wright St., Keene, NH being 16 years of age and whose date of birth is 3 April, 1968 XX is delinquent...in that said juvenile on August 3, 1984 at 10:15 PM at Wright St., Keene NH is alleged to have committed the offense of Disorderly Conduct contrary to RSA 644:2, in that he/she did:

did purposely engage in fighting, tumultuous, and threatening behavior by yelling obsenities and engaging in physical contact with her parents Henry and Julia Malachowski, said conduct serving no ligitimate purpose, and said conduct continuing despite repeated lawful orders of Ptlm. Randall LaCoste of the Keene Police Department to stop,

and that Henry/Julia Malachowski of 28 Wright St., Keene NH is/are the person(s) having custody or control of the juvenile and that Henry/Julia Malachowski of Keene is/are the parents or guardians of said juvenile.

Date 4 AUG 84 Sgt. H. Brown - Juvenile Officer, Keene Police
(Petitioner's signature)

Subscribed and sworn to by petitioner, before me.

Carol M Davis
(Justice of Peace)

(Continued)

(JUVENILE PETITION - cont.)

ORDER OF NOTICE OF HEARING

The foregoing petition has been presented, it is ordered that a hearing be held at 9:00 on 4 AUG 1984 at said District Court, and Julia and or Henry Malachowski, the person(s) having custody or control of the juvenile is/are hereby summoned to appear with the juvenile at said hearing.

Date_____ Carol M Davis
(Clerk of Court) Acting

RETURN OF NOTICE

At_____on_____, 19__, I summoned and notified the within named person(s) having custody or control of the juvenile, to appear with the juvenile at said court as ordered herein.

_____
(Police Officer)

STATEMENT OF RIGHTS

You are advised that you have a right to be represented by an attorney, unless you waive or give up that right by signing a waiver. If you desire an attorney, you should hire one before the date set for hearing. If you are unable to afford an attorney, the Court will appoint one to represent you. YOU SHOULD CALL THE COURT IMMEDIATELY IF YOU WANT A COURT APPOINTED ATTORNEY. In the event that you need additional time to obtain an attorney or prepare a response to this petition, application should be made to the Court for an extension of time. You are further advised that you have a right to remain silent and need not make any statements or give any

(JUVENILE PETITION - cont.)

evidence which might show that you have committed the offense stated in the petition. Your silence even in the face of an accusation cannot be used against you, but what you say can be used against you.

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PRE-ARRAIGNMENT ORDERS

Pending arraignment said juvenile shall be ☐ placed ☐ detained at _____ ___ pending arraignment on _____ (Date and time)

It is further ordered that Attorney _____ be appointed to represent said juvenile.

_____ _____
Date Justice

ARRAIGNMENT

On 8/4, 1984 an arraignment was held. Present were: _____ Counsel Park

Plea: ☐ True ☒ Not True
Hearing Date 8/21/84

Following arraignment it is ordered that said juvenile be held at YDC. A psychological exam is requested. City of Keene legally liable unit.

8/4/84 (Initialed)
Date Justice

ADJUDICATORY HEARING

On 9/11, 1984 an adjudicatory hearing was held. Present were Parents Counsel Park After hearing the evidence submitted the Court finds and orders as follows:

(JUVENILE PETITION - cont.)

☒ The State ☒ did ☐ did not prove its case beyond a reasonable doubt Plea of chargeable
☐ The evidence ☐ does ☐ does not substantiate the petition; petition is dismissed.
☐ The case is referred to the Probation Department or other agency_____ for an investigation and written report.
☐ It is ordered that a physical and/or mental examination of the juvenile be conducted by_____with the expenses thereof borne by_____
☐ The juvenile is to held at_____ pending disposition on_____
Date and Time
The Court further orders: Legal supervision to YSI - con'd to 10/11/84 for final disposition. City of Keene legally liable unit.

9/11/84 (Initialed)
Date Justice

DISPOSITIONAL HEARING

On 10/11, 1984 a dispositional hearing was held. Present were Park for juvenile, parents & YSI
The following disposition is ordered:
☐ Juvenile is released in the custody of_
☐ Juvenile is released in the care and supervision of_____
☐ Fine ☐ Restitution in the amount of___
☐ Juvenile placed on Probation for a term of_____
☐ Juvenile ordered to undergo the following treatment_____
☒ Other orders Legal supervision to YSI; family counselling recommended (?) possi-

(JUVENILE PETITION - cont.)

ble; review 12/27/84 City of Keene legally liable unit

OR

☐ Juvenile committed to _____ in _____ for his/her minority.

10/11/84
Date

(Initialed)
Justice

28 Wright Street
Keene, New Hampshire 03431
October 05, 1984

Sergeant H. Brown
Keene Police Department
Juvenile Division
Washington Street
Keene, New Hampshire 03431

Re: Petition #84-210
Amy Christine Malachowski

Sir:

This is to confirm my conversation with you at your office on October 05, 1984.

The complainants in the above entitled action, Henry and Julia Malachowski, hereby respectfully request the Court to withdraw their complain and dismiss all claims and/or charges in the petition brought by Sergeant H. Brown dated 4 August, 1984 in re Amy Christine Malachowski.

Respectfully submitted,
The Complainants,

_____ L.S.
Henry Malachowski

_____ L?S.
Julia Malachowski

Copy to: Clerk, Keene District Court
Mark Bennett, Esq.
David Park, Esq.

ARTICLES OF INCORPORATION
OF
MONADNOCK YOUTH SERVICES, INC.

The undersigned, being persons of lawful age, hereby associate under the provisions of RSA Chapter 292 of the laws of the State of New Hampshire by the following ARTICLES OF INCORPORATION:

ARTICLE I
Name

The name of the corporation shall be MONADNOCK YOUTH SERVICES, INC.

ARTICLE II
Object

a.) The object for which this corporation is established is to locate, support and maintain a system of foster-care and foster-homes for children in need of foster-care services; to promote the betterment of care for foster-children and to provide appropriate services related to the care of foster-children and to provide such other reasonable and necessary services which are ancillary to providing foster-care and other social services for children and youth.

b.) In providing said services, Monadnock Youth Services, Inc. shall engage solely in charitable, educational and scientific activities as permitted under and defined by provisions of Section 501 (c) (3) of the Internal Revenue Code Of 1954 or corresponding provisions of any further United States Internal Revenue Law.

c.) This corporation shall be operated exclusively for purposes permitted by said

Section 501 (c)(3) of the Internal Revenue Code.

ARTICLE III
Place

The principal place at which the business of this corporation shall be carried on is Keene, County of Cheshire, State of New Hampshire. The mailing address of the corporation shall be 3 Washington Street, Keene, New Hampshire 03431.

ARTICLE IV
Stock

The corporation will not have capital stock. It will derive its property and income from gifts, grants, bequests, appointments, intervivos and testamentary trusts, fees and the return from the investment and reinvestments of its money and other property.

ARTICLE V
Restrictions

a.) No part of the net earnings of this corporation shall inure to the benefit of or be distributable to its members, directors, officers or other private persons, except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in Article II hereof.

b.) No substantial part of the activities of this corporation shall be the carrying on of propaganda, or otherwise at-

tempting to influence legislation, and the corporation shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of any candidate for public office.

c.) Notwithstanding any other provisions of these Articles, the corporation shall not carry on any other activities not permitted to be carried on by a corporation exempt from federal income tax under Section 501 (c)(3) of the Internal Revenue Code of 1954 or the corresponding provisions of any future United States Internal Revenue Law or by a corporation, contributions to which are deductible under Section 170 (c)(2) of the Internal Revenue Code of 1954 or the corresponding provisions of any future United States Internal Revenue Law.

ARTICLE VI
Distribution of Assets of Corporation

Upon the dissolution of the corporation, the directors will, after paying all liabilities, dispose of the remaining assets of the corporation exclusively for the purposes of the corporation in such manner, or to such organization or organizations organized and operating exclusively for charitable, educational, religious or scientific purposes as shall, at the time qualify as an exempt organization or organizations under Section 501 (c)(3) of the Internal Revenue Code of 1954 or the corresponding provision of any future United States Internal Revenue Law, as may be determined by a majority vote of the members of the corporation. If the corp-

oration is unable to make distribution as set forth above, distribution shall be ordered by the Superior Court in and for the County of Cheshire under the doctrine cy pres.

ARTICLE VII
Other Powers

In general and subject to such limitations and conditions as are or as may be prescribed by law, the corporation may exercise such powers which are now or hereafter may be conferred by law upon a corporation organized for the purposes hereinabove set forth or necessary or incidental to the powers so conferred, or conducive to the attainment of the purposes of the corporation, subject to the further limitation and condition that notwithstanding any other provision of these Articles of Agreement, only such powers shall be exercised as are in furtherance of the tax exempt purposes of the corporation and as may be exercised by an organization exempt under Section 501 (c)(3) of the Internal Revenue Code and its regulations as they now exist or as they may hereafter be amended and by organization contributions which are deductible under Section 170 (c)(2) of such code and regulations as they now exist or as they may hereafter be amended.

ARTICLE VIII

The officers of this corporation, their several terms of offices, and their mode of election and respective duties and other matters appertaining thereto shall be defined and established in By-laws to be

adopted by the corporation.

IN WITNESS WHEREOF, we have hereunto subscribed our names this 5th day of April, 1983.

Timothy N. Robertson	Daniel Hill Road Keene, NH 03431
Stephen F. Knapp	P.O. Box 331 Dublin, NH 03444
Christy Lee Greene	Gowing Lane, P.O. Box 219 Dublin, NH 03444
Ronald Paranto	11 Nelson Street Keene, NH 03431
Donna F. Cawley	R. F. D. #3 Richmond, NH 03470

CERTIFICATE OF RECORDING

On the 5th day of April, 1983, a copy of the above Articles of Incorporation was recorded with the City Clerk of the City of Keene, County of Cheshire, State of New Hampshire.

CITY CLERK

SEAL